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CHICAGO BAR ASSOCIATION 73806

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46 - 28315

231 I.A. 596

GEORGE W. CUMMINGS,
Defendant in Error,

vs.

BOSIDOR DULICH,
Plaintiff in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is sought by this writ of error to reverse a judgment of $2,500 rendered against defendant by the Circuit Court of Cook County on December 9, 1922. The action was trespass, commenced on October 5, 1918.

The single count of plaintiff's declaration charged that on August 16, 1918, defendant, with force and arms, etc., "assaulted" plaintiff and "with great force and violence drove a certain automobile against, upon and over the plaintiff, and then and there with the said automobile violently knocked and threw the plaintiff down, to and upon the ground," and greatly injured him, etc. The defendant filed a plea of the general issue. On the trial the defendant, at the conclusion of plaintiff's evidence and again at the close of all the evidence, moved for a directed verdict in his favor, but the motions were severally denied. The jury returned a general verdict, finding the defendant guilty and assessing plaintiff's damages at $2,500, and also returned special findings to the effect that defendant wilfully and intentionally injured plaintiff.

It is well settled that in trespass for assault and battery malice is the gist of the action, and that under the allegations contained in said count no recovery can be had without proof of a willful or an intentional injury. (Stevens

CHICAGO BAR ASSOCIATION

46 - 28315

GEORGE W. CHERIDGE,

Defendant in Error,

vs.

CHICAGO RAILWAYS COMPANY,

Plaintiff in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE GRINNELL DELIVERED THE OPINION OF THE COURT.

It is sought by this writ of error to reverse a judgment of $2,500 rendered against defendant by the Circuit Court of Cook County on December 9, 1922. The action was trespass, commenced on October 5, 1918.

The single count of plaintiff's declaration charged that on August 16, 1918, defendant, with force and arms, etc., "assaulted" plaintiff and "with great force and violence drove a certain automobile against, upon and over the plaintiff, and then and there with the said automobile violently knocked and threw the plaintiff down, to and upon the ground," and grievously injured him, etc. The defendant filed a plea of the general issue. On the trial the defendant, at the conclusion of plaintiff's evidence and again at the close of all the evidence, moved for a directed verdict in his favor, but the motions were severally denied. The jury returned a general verdict, finding the defendant guilty and assessing plaintiff's damages at $2,500, and also returned special findings to the effect that defendant wilfully and intentionally injured plaintiff.

It is well settled that in trespass for assault and battery malice is the gist of the action, and that under the pleadings contained in said count no recovery can be had without proof of a wilful or an intentional injury. (Cravens

v. Gallagher, 224 Ill. App. 195, 197; 2 Greenleaf on Evidence, Sec. 83; Gilmore v. Fuller, 198 Ill. 130, 143; Peters v. United States, 177 Fed. Rep., 885, 888.) The main question for our decision is: Does the evidence sufficiently tend to prove that at the time and place in question defendant willfully and intentionally injured plaintiff? It is not pertinent to the issues raised by the pleadings whether defendant was guilty of negligence merely. And "the rule in this State is, that if there is no evidence, or but a scintilla of evidence, tending to prove the averments of the declaration, the jury should be directed to return a verdict for the defendant." (Allen v. U.S. Fidelity Co., 269 Ill. 234, 243; Libby, McNeill & Libby v. Cook, 222 Ill. 206, 212.)

Plaintiff was injured about 5 o'clock on the afternoon of August 16, 1918, in the Village of Winnetka, Cook County, Illinois, at or near the intersection of three streets, viz., Lincoln Avenue, Prospect Avenue and Pine Street. Lincoln Avenue runs in a south-easterly direction until it intersects Prospect Avenue practically at right angles, when it turns slightly to the right and thereafter runs in a southerly direction. Prospect Avenue is a curved street and, as it approaches and intersects but does not cross Lincoln Avenue, runs in a south-westerly direction. About at said intersection Pine Street commences and runs in a south-easterly direction. On the afternoon in question plaintiff was riding on the rear seat of a motorcycle owned and then being operated by Thomas Dyer. They were going southeast in Lincoln Avenue and approaching said intersection and moving at a rapid rate of speed. At the same time defendant was driving his automobile, in which were also seated two guests, southwest in Prospect Avenue, approaching said intersection also at a rapid rate of speed. The view of defendant to the right and towards

rate of speed. The axiom of defendant to the right and towards Prospect Avenue, otherwise said intersection was at a rapid rate of speed. At the same time defendant was driving his automobile, in which were also seated one Kramer, southward in Lincoln Avenue and Pine Street. Lincoln Avenue is a north-easterly direction until it intersects Prospect Avenue in a north-easterly direction until it intersects Prospect Avenue practically at right angles, when it turns slightly to the right and thereafter runs in a southerly direction. Prospect Avenue is a paved street and, as it approaches and intersects Lincoln Avenue, runs in a south-westerly direction. About at said intersection Pine Street commences and runs in a south-easterly direction. On the afternoon in question plaintiff was riding on the rear seat of a motorcycle owned and then being operated by Thomas Dyer. They were being overtaken in Lincoln Avenue and observed said defendant driving a motor truck operated by Thomas Dyer. They were being overtaken in the manner above described. Dyer was driving at a rate of speed of about 25 miles per hour. Plaintiff was injured about 5 o'clock on the afternoon of January 16, 1919, in the Village of Winnetka, Cook County, Illinois. (Record, pp. 5-6.)

The main question for our decision is: Does the evidence sufficiently tend to prove that at the time and place in question defendant willfully and intentionally injured plaintiff? It is not pertinent to the issues raised by the pleadings whether defendant was guilty of negligence merely. And "the rule in this State is, that if there is no evidence, or but a scintilla of evidence, tending to prove the averments of the declaration, the jury should be directed to return a verdict for the defendant." (Illinois v. U.S. Lithograph Co., 260 Ill. 234, 243; Kirby, Kohlsaat & Kirby v. Goon, 232 Ill. 306, 312.)

Lincoln Avenue was somewhat obstructed by trees, etc. Suddenly the motorcycle came in view and both the driver thereof and defendant endeavored to avoid a collision, - the former making a wide curve by first turning to the right and then to the left and attempting to run into Pine Street. The latter finally turned to the left and the "right side bumper" of the automobile struck the "back wheel of the motorcycle," and drove the motorcycle over the south curbing of Pine Street, at a point a little east of the east line of Lincoln Avenue, and upon the grass or sidewalk beyond. Plaintiff was thrown from the motorcycle and suffered serious injuries to his left foot.

After a careful consideration of the testimony we cannot find any evidence tending to prove that defendant intended to injure plaintiff or the driver of the motorcycle, Dyer. He did not know and had never heard of either. While it may be that, in approaching said intersection and after reaching it, he was guilty of some negligence, we do not think that there is any evidence fairly tending to prove that his acts and conduct at the time showed such a willful disregard of consequences or of the safety of others that an intention on his part to inflict injury upon plaintiff or others may be inferred. (Walldren Express Co. v. Krug, 291 Ill. 472, 476; Bernier v. Illinois Central R. Co., 296 Ill. 464, 470.) Dyer, and another of plaintiff's eye-witnesses to the occurrence, were allowed to testify, over defendant's objection and motion to strike, that immediately before the actual collision defendant twisted his wheel and drove "deliberately" into the motorcycle. If, by the use of this expression, the witnesses meant to convey the idea that defendant intentionally rammed the motorcycle, the testimony was improper and should not be considered. It was a mere conclusion or an opinion of another's intention. The trial court should have allowed defendant's motion for a directed verdict in his favor.

directed verdict in his favor.

The trial court should have allowed defendant's motion for a new trial. It was a mere conclusion or an opinion of another's intention. The testimony was improper and should not be considered. To convey the idea that defendant intentionally rammed the motorcycle. If, by the use of this expression, the witness meant defendant twisted his wheel and drove "deliberately" into the path of the motorcycle in view and both the driver thereof and defendant endeavored to avoid a collision, - the former making a wide curve by first turning to the right and then to the left and attempting to run into Pine Street. The latter finally turned to the left and the "right side bumper" of the automobile struck the "back wheel of the motorcycle," and drove the motorcycle over the south curbing of Pine Street, at a point a little east of the east line of Lincoln Avenue, and upon the grass or sidewalk beyond. Plaintiff was thrown from the motorcycle and suffered serious injuries to his left foot.

After a careful consideration of the testimony we cannot find any evidence tending to prove that defendant intended to injure plaintiff or the driver of the motorcycle, Dyer. He did not know and had never heard of either. While it may be that, in observing said intersection and after rounding it, he was mildly of some negligence, we do not think that there is any evidence tending to prove that his acts and conduct at the time showed such a willful disregard of consequences or of the safety of others that an intention on his part to inflict injury upon plaintiff or others may be inferred. (Wallgren Engineering Co. v. Kane, 301 Ill. 472, 476; Hegnick v. Illinois Central R. Co., 306 Ill. 464, 470.) Dyer, and another of plaintiff's eye-witnesses to the occurrence, were allowed to testify, over defendant's objection and motion to strike, that immediately before the actual collision

Under the pleadings and the evidence we feel constrained to reverse the judgment of the Circuit Court of Cook County with a finding of fact and such will be the order.

REVERSED WITH FINDING OF FACT.

Fitch and Barnes, JJ., concur.

46 - 28315

FINDING OF FACT.

We find as an ultimate fact in this case that at the time and place in question the defendant, in the operation of his automobile, did not willfully and intentionally injure the plaintiff.

94 - 28370

IN THE MATTER OF THE ESTATE OF CLARENCE M. BAILEY, deceased,

LAURA BOOTH,
Claimant and Appellee,

vs.

HENRY W. LEMAN, Administrator of said estate,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT:

Laura Booth filed her claim in the Probate Court of Cook County against the estate of Clarence M. Bailey, deceased, for services rendered him as nurse during his lifetime from May 2, 1917, to May 21, 1930, for certain laundry work done and for certain moneys advanced. On April 19, 1932, after a hearing, the Probate Court allowed the claim to the extent of $1,576 as of class #6 to be paid in due course of administration. From this order the administrator appealed to the Circuit Court, where there was a trial de novo without a jury, resulting in the court finding the issues for the claimant and that the order of the Probate Court be affirmed and entering judgment, on December 1, 1932, in favor of the claimant in said sum. The present appeal followed.

The bill of exceptions discloses that the claim was only allowed for the claimant's services as nurse for the period mentioned and to the extent of $1,576; that she claimed $20 per week for 159 weeks, or $3,180; and that of this total sum she had received on account monthly payments from the deceased in varying amounts aggregating $1,604, leaving a balance of $1,576. She took the stand as a witness in her own behalf and testified on direct examination, without objection, that

she acted as nurse for the deceased in Chicago from May 2, 1917, until his death on May 21, 1920, and that she kept a certain account book during that period, which she produced. At this point the attorney for the administrator objected to her testifying "further," on the ground that she was a claimant prosecuting a claim against the estate of a deceased person and was not a competent witness under the statute, all of which said attorney must have known when the witness first took the stand and gave her name. The court allowed her to further testify that the entries in said book were in her own handwriting and were made at the time of the respective dates. The admission of the book in evidence was objected to by the attorney for the administrator but the court received it in evidence, subject to the objection. It showed various dates each month from May 10, 1917, to April 20, 1920, and different amounts opposite each date, representing the said payments. The witness was then cross-examined by said attorney and further testified that she attended the deceased as nurse, at the Palmer House, Chicago, continuously, day and night, during said period, and that her expenses at the hotel for board, etc., during said period had been paid as agreed. Said attorney then moved that all of her testimony be stricken from the record, which motion was denied. Three other witnesses testified in behalf of the claimant. The testimony of two of them showed that during the period in question the condition of deceased was such that he needed the services of a nurse and that the claimant acted as such. The last witness, the attending physician of the deceased, testified that the claimant acted as nurse for the deceased and that the ordinary and reasonable compensation for such services as she rendered was $25 per week. The claimant only claimed $20 per week. No evidence was offered on behalf of the estate.

Counsel for the estate contends that the court erred in permitting the claimant to testify and in not granting the motion to strike from the record all of her testimony. Some of her testimony was not objected to until after she had given it and some was elicited on cross-examination. Under the circumstances the court did not err. (Chicago Trust Co. v. Carola Lumber Co., 242 Ill. 468, 474; People v. Lawhill, 299 Ill. 393, 408.)

And we think that the court properly allowed the claimant to testify as to her making the entries in the book, and when made, and in admitting the book in evidence. (Miller v. Frith, Ex'tr'x, 179 Ill. App. 204, 206; McGlasson v. Housel, Ex'tr'x, 127 Ill. App. 360; Alling v. Pranee, Admx., 27 Ill. App. 595.) If it be thought that the book is not strictly a book of account and inadmissible for that reason, it is to be presumed, inasmuch as the case was tried without a jury, that the court only considered such evidence as was proper. (Beggs, Adm'r. v. Chicago Bonding & Surety Co., 307 Ill. App. 621, 627.) Furthermore, the admission in evidence of the book was not essential to make a case for claimant. It merely showed certain payments which her attorney admitted she had received. And we think that the undisputed evidence was sufficient to overcome any presumption that she had been fully paid each month for her services.

For the reasons indicated the judgment of the Circuit Court will be affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

112 - 28388

CHARLES J. NYQUIST, administrator of the estate of ROGER EDWARD NYQUIST, deceased,

Appellee,

vs.

ELMER E. VAUGHN,

Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

231 I.A. 596

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for the death of plaintiff's intestate, a boy 5-1/2 years of age, occasioned by his being struck by an automobile owned and driven by defendant at or near the intersection of Sheffield and Wellington avenues in the City of Chicago, on Sunday afternoon, October 26, 1919, about 5:45 p. m. The deceased left him surviving his father, his mother, a minor sister and two minor brothers as his only heirs-at-law and next of kin. The declaration consisted of three counts. The first count charged general negligence in the operation of the automobile at the time and place. The second and third counts respectively charged defendant with negligence in driving the automobile through a closely built up business portion of the city at a speed greater than 10 miles per hour, contrary to the statute, and in driving the automobile through a residential portion of the city at a speed greater than 15 miles per hour. The defendant filed a plea of not guilty. On the trial plaintiff called five witnesses and defendant seven witnesses. On the somewhat conflicting evidence as to the details of the accident the jury returned a verdict finding defendant guilty and assessing plaintiff's damages at $5,000. Judgment was entered on the verdict on November 18, 1922, and this appeal followed.

Sheffield avenue is a north and south street and Wellington avenue intersects it at right angles. There are

double street car tracks in Sheffield avenue. The immediate district may properly be considered as a residential district, although there are some stores near the intersection. The defendant, a physician, was driving his automobile south on Sheffield avenue and crossing Wellington avenue at a speed of about 35 miles per hour, according to the testimony of two of plaintiff's witnesses. In the automobile were several guests. A northbound street car, having come to a stop immediately south of Wellington avenue to discharge passengers, had started to cross that street, and the boy either walked or ran behind the car in a westerly direction, and in attempting to cross Sheffield avenue was struck by the automobile and suffered injuries from which he shortly thereafter died.

Two grounds for a reversal of the judgment are urged and argued by counsel for defendant. The first is in substance that the testimony of plaintiff's witnesses was so exaggerated and unfair as to cause the jury to believe that defendant at and immediately before the accident was going at a reckless rate of speed, so that they "mulcted him in heavy damages for an accident that was entirely unavoidable." We have reviewed the entire abstract of the testimony, and we think that the jury were fully warranted in finding that the defendant was guilty of negligence in running his automobile at an excessive rate of speed at the time and place and under the circumstances shown, and that his negligence was the proximate cause of the accident. The boy was only 5-1/2 years of age and his contributory negligence, if any, is no defense to plaintiff's action. (Richardson v. Nelson, 221 Ill. 254, 257; Chicago City Ry. Co. v. Tuohy, 196 Ill. 410, 433; Chicago City Ry. Co. v. Wilcox, 138 Ill. 370, 382.)

The second ground urged is that the boy's parents, who lived in the immediate neighborhood, were guilty of such contributory negligence in allowing him to be on the street at the

time as bars a recovery. We do not think so. The boy was in company with a playmate and it does not appear that either parent knew that he had gone from home or that either had consented to his going to the street intersection. And it cannot be considered negligence on the part of parents in failing to watch and to prevent active, healthy boys of 5-1/2 years of age from going outside the home and upon the street except when attended by one of more mature years.

Finding no error in the record, the judgment of the Circuit Court will be affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

134 - 28410

THE HANGMLE ICE COMPANY,
a corporation,
Plaintiff and Appellee,

vs.

OTTO TEMKL and LOUIS I. GOTTLIEB,
Defendants.

ON APPEAL OF LOUIS I. GOTTLIEB,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 396

MR. PRESIDING JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Louis I. Gottlieb, one of the defendants, from a joint judgment of $173.60, rendered against him and Otto Temkl by the Municipal Court of Chicago on November 28, 1922, after a trial without a jury.

The action was commenced on November 2, 1922, against John Oprics and said Temkl and Gottlieb, doing business as or interested in the New Paradise Coffee Shop. Plaintiff's claim was for $173.60 for certain ice sold and delivered during the months of July, August and September, 1922, and during the month of October, up to and including October 17, 1922. It was not disputed that ice to the value claimed had been delivered by plaintiff to the coffee shop or restaurant at No. 708 West North avenue, Chicago, at the request of Temkl. All three defendants were served with process. The defendant, Gottlieb, alone filed an affidavit of merits, denying that he, at any time was doing business as said New Paradise Coffee Shop jointly with his co-defendants, or either of them, and further denying that he was jointly liable with them or either of them. During the trial, on plaintiff's motion, the action was dismissed as to the defendant, Oprics.

Plaintiff, to sustain its case, called all three

defendants as witnesses under section 33 of the Municipal Court Act and they severally testified. It appears that during a portion of the month of July, 1922, and for several preceding months Oprics and Temkl operated the restaurant as partners. During July, 1922, Oprics decided to sell out his interest in the business, and Temkl went to Gottlieb and requested him to advance the necessary money to purchase Oprics' interest. After negotiations Gottlieb agreed to lend Temkl one-half of the amount necessary to purchase Oprics' interest on condition that the latter would accept the notes of Temkl for the other half. The deal was finally closed on July 24, 1922. Temkl signed certain notes and delivered them to Gottlieb, and Gottlieb gave Oprics $1650 in cash and the same amount in Temkl's notes. At the same time Temkl and Oprics executed an assignment of the lease, which they held as lessees of the premises, to Gottlieb, and they also executed a bill of sale of the fixtures, etc., to Temkl. These papers were delivered to Gottlieb, as he claims, as security for the cash which he had paid to Oprics at Temkl's request. According to Oprics' testimony, Temkl, at the time of the consummation of the deal, assumed all of the liabilities of the old partnership. Subsequently Oprics sold to Gottlieb at a discount all of the Temkl notes which he had received. Temkl operated the restaurant after July 24, 1922, and up to October 17, 1922, when Gottlieb took possession of it and put in a man, named Wallman, to operate it, until, as Wallman testified, Gottlieb and Temkl had come to an agreement. Wallman was operating the restaurant at the time of the trial. Temkl's testimony was to the effect that since July 24, 1922, and up to October 17, 1922, he operated the restaurant as manager or agent for Gottlieb.

It is clear that Gottlieb and Temkl cannot be held jointly liable for the ice delivered by plaintiff during July and up to October 17, 1922, and that, in view of Gottlieb's affidavit of merits denying such joint liability, the trial court erred in entering the joint judgment appealed from. (Kadish v. Bullen, 10 Ill. App. 566; Limousine and Carriage Mfg. Co. v. Shadburne, 185 Ill. App. 403, 406.) And we do not think that it was sufficiently proved that during the period mentioned Gottlieb was the owner of the restaurant, and, therefore, liable as an undisclosed principal for the ice which Temkl ordered. Consequently, we cannot agree with the contention of counsel for plaintiff that the cause should be remanded with directions to the trial court, as in the Shadburne case, supra, to require plaintiff to elect whether it will take judgment against Temkl or Gottlieb, and when such election is made to enter judgment accordingly. We think that, as to any liability of the defendant, Gottlieb, for the ice in question, there should be a new trial. Accordingly, the judgment of the Municipal Court is reversed and the cause is remanded, with the suggestion that plaintiff elect against which of the two defendants it will proceed in this action, and amend its statement of claim accordingly, and that after such election and amendment a new trial be had.

REVERSED AND REMANDED.

Barnes and Fitch, JJ., concur.

(3837)

144 - 28420

A. KAMENJARIN,
Appellee,

vs.

MIKE KRISTICH,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 237

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On February 20, 1922, in the Municipal Court of Chicago, plaintiff caused a judgment by confession for $235 to be entered in his favor on defendant's judgment note of $200, dated January 14, 1921, payable on demand to plaintiff's order, with interest at the rate of six per cent per annum after date, and providing for $30 attorney's fees. The amount of the judgment entered against defendant included the face of the note, accrued interest, and attorney's fees. Subsequently, on motion of defendant supported by his affidavit, the judgment was opened and defendant was given leave to defend, the judgment to stand as security, etc. On the first trial the court found the issues against plaintiff, but a new trial was granted. On the second trial there was a finding against defendant and it was adjudged that the judgment entered by confession stand confirmed as of the date of the rendition thereof. Defendant appealed.

The bill of exceptions discloses that the cause was tried on an agreed statement of facts, supplemented by additional evidence. It appears that on January 14, 1921, the parties executed a written contract, wherein defendant agreed to purchase at the price of $4,500, a certain piece of improved real estate in Chicago, Illinois, and plaintiff agreed to sell the premises to defendant at said price, and to convey to defendant

"a good and merchantable title thereto by general warranty deed," subject, however, to certain existing leases, taxes, assessments, etc., and also subject to a mortgage of $2,000, due May 1, 192[illegible]. It was further provided in the contract that defendant, as purchaser, "has paid $300 as earnest money, to be applied on such purchase when consummated," and agrees to pay within five days after the title has been examined and found good, or accepted by him, "the further sum of $1300, * * provided a good and sufficient general warranty deed, conveying to said purchaser a good and merchantable title to said premises (subject as aforesaid), shall then be ready for delivery; the balance of $1,000 shall be paid on or before one year, with interest from the date hereof at the rate of six per cent per annum, payable semi-annually, to be secured by the purchaser's notes and mortgage or trust deed of even date herewith on said premises." It was further provided in the contract that a certificate of title issued by the Registrar of Titles of Cook County, or a complete merchantable abstract of title, or merchantable copy, brought down to date, or merchantable title guaranty policy, should be furnished by the vendor "within a reasonable time;" that the purchaser or his attorney, if an abstract or copy be furnished, should, within ten days after receiving such abstract, deliver to the vendor a note or memorandum in writing, specifying in detail the objections to the title, if any; that in case material defects be found in the title and so reported, then, if such defects be not cured "within 60 days after such notice thereof," the contract should, at the purchaser's option, become absolutely null and void, and said earnest money should be returned. It was further provided in the contract that "should the purchaser fail to perform this contract promptly on his part, at the time and in the manner specified, the earnest money paid as above, shall, at the option of the vendor, be re-

tained by the vendor as liquidated damages, and this contract shall thereupon become and be null and void."

It further appears that the $300, mentioned in the contract as having been paid by defendant as earnest money, was not in fact paid at or before the time of the execution of the contract, but that "in lieu thereof" the judgment note in question was delivered to plaintiff; and that, on the day following the execution of the contract and the delivery of the note, "defendant notified plaintiff that he, the said Mike Kristich, would not proceed with the purchase of the said property, and then and there repudiated his contract." The evidence does not disclose why defendant decided to repudiate the contract. It further appears that at the time of its execution plaintiff owned an "equitable interest" in the premises, that he was the owner and holder of another contract made with the owners of the fee simple title to the premises to purchase the same, that he acquired said equitable interest on November 17, 1920, and that at the time of the execution of the contract in question, he had paid a large part of the money contracted to be paid under the terms of said other contract. It further appears that plaintiff did not tender to defendant any abstract of title or guaranty policy, or deed, to the premises, and, after defendant's said repudiation, took no further steps towards the consummation of the contract in question.

Under the provisions of the contract and the facts in evidence, had defendant paid to plaintiff the earnest money of $300, instead of giving to him the judgment note sued on, we think it clear that plaintiff could have properly retained said sum as liquidated damages. And we can see no reason why plaintiff should not be allowed to have judgment confessed on defendant's note according to its terms, which note was taken

by plaintiff in lieu of the $200, stipulated in the contract as having been paid as earnest money. Defendant on the day following the execution of the contract peremptorily repudiated it. And certainly it was not incumbent on plaintiff to thereafter tender an abstract, or guaranty policy, or deed, because such tenders, in view of defendant's attitude, would have been useless and were unnecessary. (Fleming v. O'Donohue, 306 Ill. 595, 598.)

The main point relied upon by defendant's counsel for a reversal of the judgment is that plaintiff did not have, at the time of the execution of the contract, such title to the premises as justified him in holding defendant to the strict terms of the contract. In our opinion the point is without merit. It is to be observed that in the contract plaintiff did not covenant that he possessed a good title to the premises at the time of the execution of the contract. His covenant was that he would convey to defendant by general warranty deed "a good and merchantable title" to the premises. At that time he had an "equitable interest" in the premises. By the terms of the contract he had a "reasonable time" within which to furnish an abstract of title, etc., and defendant had ten days in which to examine the abstract, etc., and thereafter, if material defects were found in the title, plaintiff had sixty days, after notice of the defects, to cure them. It was only required that plaintiff should have a good and merchantable title when the time arrived for the tender of a warranty deed, which tender was rendered useless by defendant's said repudiation of the contract. In Runkle v. Johnson, 30 Ill. 328, 332, it was decided in substance that where a vendor sold land, to be paid for in installments, with covenants on his part to convey a good title, it might be no defense to an

action brought to recover the first installments before the last one became due that the vendor then had no title, for he had the whole time until the contract matured to obtain the title, and that it would be a good answer to such a defense for the vendor to show that, although he did not hold the title, he controlled it, so that he could in fact perform his covenant. See, also, Ashbaugh v. Murphy, 90 Ill. 182; Evans v. Terry, 174 Ill. 595, 602; Lang v. Hedenberg, 277 Ill. 368, 374; Thompson v. Meppert, 130 Ill. App. 588. In the Thompson case, last cited, it is said (p. 593): "A vendor who agrees to convey a good title at a future date, after the completion of various payments to be made is not required to have the title when he makes the contract, or at any time prior to the tender of the last payment. He is entitled to the entire life of the contract in which to procure the title, and it is therefore no excuse by the vendee for a failure to make any of the intermediate payments that the vendor has not acquired title."

For the reasons indicated the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Barnes and Fitch, JJ., concur.

156 - 28432

IN THE MATTER OF THE ESTATE OF ANNA C. BEHREND, deceased.	
GEORGE BEHREND, Claimant and Appellant,	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
vs.	
EDWARD BEHREND, as administrator of said estate, Respondent and Appellee.	231 I.A. 597

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Anna C. Behrend, about 73 years of age, departed this life intestate at Chicago on May 9, 1920, and one of her sons, Edward Behrend, was appointed by the Probate Court of Cook County as administrator of her estate. For several years prior to her death she owned and lived in an apartment building at No. 1800 Belmont avenue, Chicago. George Behrend, another son and unmarried, lived with her. Until about two months before her death she also owned an adjoining building at No. 1802 Belmont avenue, where a third son, Fred A. Behrend, resided. About one year after her death George Behrend filed in the Probate Court the following claim against her estate:

"To expense and upkeep of an automobile used for the benefit of Anna C. Behrend.....$1,000

To painting and repairs of 1802 Belmont avenue..... 150

To services rendered as nurse and constant attendant during the period from 1915 to 1920 while Anna C. Behrend was ill and decrepid, and unable to take care of herself. Value of services rendered.....$2,000

To painting and decorating premises at 1800 Belmont avenue in 1917..... 50

Total amount due and unpaid.....$3,200"

On April 26, 1922, after hearing evidence, the Probate Court disallowed the claim and the claimant appealed to the Circuit Court, where there was a trial de novo before a jury, resulting in a verdict finding the issues for the administrator. The claimant's motion for a new trial was overruled, and on October 14, 1922, the Circuit Court entered the judgment against him which by this appeal he seeks to reverse.

One of the grounds urged for a reversal of the judgment is that the verdict is contrary to the evidence and to the law. We do not think so. As to the first item mentioned in the claim it appears that the automobile belonged to the claimant and was used by him for his own pleasure and convenience. While deceased in her lifetime sometimes rode as a passenger in the automobile at claimant's invitation, it is clear that the expense of running it and for repairs cannot properly be charged against the estate. As to the other items of the claim it is to be presumed that the alleged services, as nurse and attendant andin doing the painting and decorating and making the repairs mentioned, were performed gratuitously, in the absence of an express contract for payment or of facts and circumstances from which an agreement to make payment may be implied. (29 Cyc. 1629-31; 18 Cyc. 412-14; Miller v. Miller, 16 Ill. 296; Falcon v. McIntyre, 118 Ill. 292, 298; Switzer v. Lee, 146 Ill. 577; Heffron v. Brown, 166 Ill. 322, 326.) We think that the jury were fully justified from the evidence in finding that there was no contract either express or implied for payment by the mother for the alleged services. The statements made by the mother while living, as testified to by certain of the claimant's witnesses, were not such as required the jury to find for the claimant in any amount. (Schwachtgen v. Schwachtgen, 65 Ill. App. 127, 129.) And we do not think that the admission of a certain statement claimed to have been

made by the deceased during her lifetime out of the presence of the claimant, and showing improper conduct on his part towards the deceased, was such error as requires a reversal of the judgment. The verdict was right, substantial justice has been done between the parties, and, in our opinion, the admission of the statement was not prejudicial error. (Newkirk v. Cone, 18 Ill. 449, 454; Hopkins v. Indianapolis & St. Louis R. Co., 78 Ill., 32; Ashelman v. Rawalt, 220 Ill. App. 68, 70.)

For the reasons indicated the judgment of the Circuit Court is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

190 - 28466

FOUNTAIN INN OIL MILL CO., a corporation,
Appellee,

vs.

NATIONAL LUMBER MUTUAL INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I.A. 597

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant insurance company of Chicago, Illinois, from a judgment for $1,303.28 rendered against it by the Municipal Court of Chicago on November 28, 1922, in an action tried before the court without a jury upon a policy of fire insurance, No. 5281, for $1500 issued on October 27, 1919.

Plaintiff's mill and plant was at Fountain Inn, South Carolina, and on November 24, 1919, while the policy sued upon and other policies issued by other insurance companies were in full force and effect, a fire occurred resulting in the destruction of all of plaintiff's property covered by the policies except two buildings. The proportionate share of the loss under the policy sued upon amounted to $1,303.28. Defendant refused to pay to plaintiff any amount under the policy, and on November 22, 1920, the present action was commenced.

One of the conditions of the policy was in substance that, if a fire occurred, the insured should give immediate notice in writing of any loss, and within 60 days after the fire "render" written proofs of loss. Defendant's sole defense, as disclosed in the affidavit of merits sworn to by its secretary, C. G. Gilkeson, was that plaintiff did not,

within 60 days after the fire, "render" the proofs of loss required. It appears that immediate notice in writing of the loss was given by plaintiff to defendant's agents, A. F. Houts & Co., of New York City, through whom plaintiff had procured the policy; that prior to December 5, 1919, both defendant and Gilkeson, its secretary, at Chicago, had been informed by Houts & Co. of said loss; that during December, 1919, W. S. Rankin, an insurance adjuster at Savannah, Georgia, employed by plaintiff, and other adjusters representing certain interested companies, had reached an adjustment; that on December 16th Rankin wrote defendant concerning said adjustment, advising it that when the proper apportionment of loss had been made he would forward to it proofs of loss properly signed; and that proper proofs of loss were mailed in apt time to defendant at "Chicago, Illinois," by Rankin from Savannah, on December 31, 1919. Rankin testified by deposition on direct examination: "I personally placed this proof of loss in an envelope, sealed, and addressed it to the National Lumber Mutual Insurance Company, Chicago, Illinois, which was the only address and the full address shown on their policy of insurance, and I personally placed said proof of loss in the United States mail in Savannah, Georgia, on or about December 31, 1919." On cross-examination he testified that the letter written by him to defendant and which was placed with the proofs of loss in said envelope, was dictated by him on December 27th, that the actual mailing was delayed to either December 29th or 31st, but that he was sure that he personally "mailed" the letter not later than December 31, 1919. He further testified that, not receiving an acknowledgment from defendant of the receipt of the letter, he, on January 28, 1920, (the 60th day after the fire) from Savannah, telegraphed defendant to "Chicago, Illinois," as follows: "Wire if received proofs of

loss mailed December 29th, Fountain Inn Oil Mill, Fountain Inn, South Carolina; fire November 24th." Defendant did not reply to this telegram although it was received early in the afternoon of January 23rd, and, because of the non-receipt of any reply, Rankin on the same day prepared duplicate proofs of loss and enclosed them in a letter addressed to defendant at "Chicago, Illinois," and directed that the letter be immediately registered and mailed. This letter was not in fact registered or mailed until January 24th (the 61st day after the fire), but it was received in due course by defendant at Chicago, and on February 2nd, defendant, per Gilkeson, acknowledged its receipt but declined to accept the "purported proofs of loss" and denied liability under the policy on the ground that said proofs of loss had not been rendered within the time required.

Gilkeson, called as defendant's witness, testified in substance on direct examination that as secretary of defendant he handled all of its correspondence between November 1, 1919, and the middle of February, 1920; that he did not answer Rankin's telegram of January 23rd; that he received the duplicate proofs of loss forwarded by Rankin about January 31st; and that said duplicate was the only proofs of loss which either he or the defendant had ever received. On cross-examination he testified in substance that sometimes he was out of town and when absent from the office his assistant, Mrs. Shaffer, opened all the company's incoming letters, and that those which needed immediate attention "she attended to, but the rest she left on my desk, including copies of whatever she had attended to;" that he did not answer Rankin's telegram of January 23rd, for the reason that it was received during his absence from the office and when he returned two days later it was then too late to wire or write a reply and he "desired to look into the matter;" and that he did not answer Rankin's letter of December 16th, because he "did not

think it called for an answer and because it is the assured's duty to furnish insurance companies with proofs of loss." Mrs. Shaffer, Gilkeson's assistant, was not called as a witness by defendant.

Inasmuch as the duplicate proofs of loss were not mailed in time under the provisions of the policy, the only question of fact for the court sitting as a jury to determine was: Were the proofs of loss, mailed by Rankin on December 31, 1919, received by defendant at Chicago, within the 60 day period following the fire of November 24th: The trial court so found and we cannot agree with the contentions of defendant's counsel that the finding is manifestly against the weight of the evidence and against the law.

It is well settled that proof of the mailing of a letter, properly addressed, is prima facie evidence of its having been received by the party to whom addressed, but that this is a mere presumption of fact which may be rebutted. (Meyer v. Krohn, 114 Ill. 574, 586; Young v. Clapp, 147 Ill. 176, 190; Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149, 158.) Such presumption of fact, as regards Rankin's letter of December 31, 1919, containing plaintiff's proofs of loss, was attempted to be rebutted by the testimony of Gilkeson, defendant's secretary, to the effect that neither he nor the company ever received the letter. But "it has been held that evidence of non-receipt, even though it consist of the addressee's positive denial of receipt, does not nullify the presumption, but leaves the question for the determination of the jury under all the circumstances, with such weight given to the presumption as they think it entitled to." (16 Cyc. 1070; 22 Corpus Juris 102) In several decisions of the appellate court of this State for the second district, this holding has been followed. (Kewanee National Bank v. Ladd, 178 Ill. App. 151, 156; Maj v. American

Bottle Co., 182 Ill. App. 636, 642; Wakenight v. West, 217 Ill. App. 199, 201.) It has been held that "the testimony of the addressee that the letter was not received should be regarded with caution - with the greatest amount of caution - where non-receipt, if proved, would relieve him of a burden." (16 Cyc. 1071; Kewanee National Bank v. Ladd, supra.) The language of the court in Wakenight v. West, supra, is here applicable, viz: "In this case the appellant testified that he did not receive the letter; and if the jury had believed the appellant, the presumption of law would have been rebutted; but it is evident that the jury did not believe the appellant, and it was the province of the jury not to do so, if they thought his testimony in that regard unworthy of belief."

But it is urged by counsel for defendants that no presumption obtains that Rankin's letter of December 21st was received by defendant because his testimony does not disclose that he put a stamp on the envelope. It was brought out in cross-examination that he personally "mailed" the letter. This is sufficient. In 5 Words and Phrases (New Series) 308, it is said: "The general statement of one that he 'mailed' a letter to another is sufficient evidence that he did everything necessary to raise the presumption that it was received in due course of mail;" and that "the word 'mailed' implies the payment of the necessary postage." (See, also, Pier v. Heinrichshoffen, 67 Mo. 163, 169; City of Omaha v. Yancey, 91 Neb. 261, 268; Southern Engine Works v. Vaughan, 98 Ark. 388, 392.)

It is further argued that the letter was not properly addressed so as to raise the presumption of its receipt by defendant, inasmuch as the address was "Chicago, Illinois," without any street or number written on the envelope. While it is true that there are decisions holding in substance that, where the addressee resides in a city of considerable size, the receipt by him of a letter cannot be presumed, unless his correct

The language of the court in Yakoni ait v. West, supra,

address was shown to be on the envelope when mailed, including the correct street and number where he resides or does business (22 Corpus Juris 98), we do not think that such decisions are controlling under the facts shown in the present case. The only address of defendant appearing on the policy as issued to plaintiff was "Chicago, Illinois." By issuing a policy, giving only such general address, defendant held out to plaintiff and its other policy holders that mail matter so addressed to it would reach it. Furthermore, it appears that defendant is a well-known corporation, doing considerable fire insurance business in Chicago, and that other letters, including the letter containing said duplicate proofs of loss, and a telegram, addressed to it at Chicago without giving the street and number where it had its office and did business, promptly reached their destination. (See Kewanee National Bank v. Ladd, 175 Ill. App. 191, 196; Covell v. Western Union Telegraph Co., 164 Mo. App. 630, 636.) In the Covell case, last cited, it is said (p. 637): "It stands admitted that the second letter, mailed too late to be received within the 60 day period, but directed exactly as the first one, was promptly delivered, and this gives support to the inference that the first one was also promptly delivered."

For the reasons indicated the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes and Fitch, JJ., concur.

199 - 28475

WILSON B. GOLDEN, Appellee,	)	APPEAL FROM
	)	CIRCUIT COURT,
vs.	)	COOK COUNTY.
COUNTY OF COOK, Appellant.	)	231 I.A. 397

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On April 5, 1922, in the Circuit Court of Cook County, plaintiff commenced an action in assumpsit, against the County of Cook to recover the sum of $9,584.50, which, as he claimed, was due him for unpaid salary as an elevator operator at the Cook County hospital, in the classified civil service of the County, from March 1, 1914 to March 31, 1922, which position he alleged he had "not been permitted to occupy" at any time during said period, although the necessary appropriation therefor had annually been made. Plaintiff's declaration consisted of a special count and the common counts to which defendant filed a plea of the general issue and three special pleas. There was a trial without a jury, resulting in the court on January 16, 1923, finding in plaintiff's favor and entering judgment against defendant in the amount claimed. This appeal followed.

On April 1, 1914, plaintiff commenced in said Circuit Court a prior action against defendant. In his declaration then filed he alleged in substance that on March 23, 1901, he took the civil service examination for the position of elevator operator at said hospital, passed the examination with the required percentage and was placed on the eligible list; that on July 18, 1901, he was duly appointed to the position, and thereafter worked in the position until July 15, 1913, when he was laid off; that such proceedings were thereafter had that on October 6, 1913, he

was reinstated and given a furlough of one month; that in November, 1913, without cause and without charges being preferred against him, defendant "refused to permit him to perform his work as such elevator operator, since which time he has performed no work in such position;" that during the years 1911, 1912, and 1913, he had received less than the amount appropriated for the position (viz., the wages of a laborer instead of an elevator operator) and that for the last 5-1/2 months of the year 1913, and for the first two months of the year 1914 he had received nothing; that defendant, without cause, had prevented him from working in the position since July 15, 1913; that he had made diligent search to obtain other employment without success; and that he had not been laid off for lack of work or for lack of appropriation. He claimed that he was entitled to recover the total sum of $1230, being for the most part the difference between what he had been paid as wages during the years 1911, 1912 and 1913 and what during those respective years had been appropriated for the position. The only defense made, as disclosed by defendant's special plea and its theory upon the trial, was that plaintiff had not passed the civil service examination at the required percentage of 70 (having originally been marked at 68), and his appointment was contrary to the rules of defendant's civil service commission and was null and void, and, therefore, plaintiff could be removed from the position without compliance with the procedure prescribed by statute for removal from the classified civil service. The records of the commission were somewhat faulty in that they did not disclose with certainty whether or not plaintiff had passed his examination with the required percentage, but it appeared that he had in fact been registered as an eligible elevator operator, had been appointed to the position, had accepted the appointment, had performed duties thereunder and for several

years at least had received the entire wages appropriated. It further appeared that commencing in 1911 and continuing down to July 15, 1913, when he was laid off, he received less than the amount appropriated for an elevator operator. At the conclusion of the hearing of said prior action the court on January 16, 1917, directed the jury to return a verdict for plaintiff in said sum of $1,230, as claimed, which the jury did. For some unexplained reason judgment was not entered until November 23, 1920, nearly four years thereafter. Defendant appealed to this appellate court, and on January 17, 1922, the judgment was affirmed. (Golden v. County of Cook, 224 Ill. App. 628, opinion abstracted.) In the opinion then filed we said:

> "If therefore we may presume the regularity of proceedings in placing plaintiff's name on the register and that it was merely through inadvertence that his corrected rating of 70% was not transferred thereto, then the judgment should be affirmed. * * Besides, the proceedings having been regular in every other respect, he having been certified to the appointing power as on the list of eligibles, and appointed on the assumption that such certificate was in accordance with the law and facts, and having retained the position under the appointment for 12 years, we think these facts should operate as an estoppel to question the legality of his appointment or his right to the compensation for the position as legally appropriated for. It is urged that the salary he received during the years referred to was that allowed for a laborer, and that some months after he was laid off the commission offered to reinstate him to the position of laborer. While there is no evidence of what salary a laborer received these facts present no defense to his right to compensation according to appropriations for the position for which he was registered and appointed."

In plaintiff's declaration in the present action he set forth in haec verba his declaration in the prior action, the substance of defendant's special plea thereto, the verdict and judgment, and the affirmance of the judgment by this appellate court, and alleged that on March 30, 1923, defendant had paid to him the sum of $1,428.38, which was the amount of said judgment, interest and costs, and he further alleged that the judgment "is res adjudicata of the fact that plaintiff is an elevator operator,

an employee of Cook County in the classified service, and entitled to all the emoluments and salary appropriated for said position." Plaintiff then set forth the appropriations made annually by defendant for elevator operators for the years from 1914 to 1922, inclusive, and further alleged that for the period from March 1, 1914, to March 31, 1922, he had received no pay as elevator operator, and that, crediting the amount paid him on said judgment, interest and costs, there was due him on March 31, 1922, the sum of $9,584.50; that no charges had ever been preferred against him and that "he still is and remains an elevator operator of the County of Cook, entitled to all rights and privileges of said employment and to receive the salary or wages as appropriated during the period for said position;" that without cause he was "prevented by defendant from working" in said position from July 15, 1913, thence hitherto, and particularly from March 1, 1914, thence hitherto, during which time he made diligent search to obtain employment from other persons but was unable so to do; that "during said period" he was not kept from work because of lack of work or lack of appropriation or for any other necessary cause; and that defendant "without just cause or excuse" has refused to pay him the balance of his wages as an elevator operator during said period, or the balance of the money appropriated for the position during said period.

Defendant's three special pleas were in substance; (1) That plaintiff submitted to and acquiesced in his lay-off on July 15, 1913, and from thence hitherto; that he has not since reported for duty, or performed, or offered to perform, any work as an elevator operator or otherwise for defendant, and has not since brought any direct or proper proceeding to reinstate himself in said position; and that by reason of his failure thus to act he has abandoned the position. (2) That by reason of plaintiff's said acquiescence and submission the position has been filled by

others, and that the monies appropriated for the position have from time to time been paid to them. (3) Plea of the statute of limitations of five years. To these special pleas plaintiff filed replications, in which he denied the facts stated in the pleas and further alleged in substance that said former judgment was res adjudicata of the issues involved in the present action.

On the trial plaintiff testified in substance that from March 1, 1914, to March 31, 1923, he had "stood ready, willing and able to work" as an elevator man; that during these years he had no work which paid a salary and had been unable to get work though he tried so to do; that after he was laid off in July, 1913, he never went back and offered to work as an elevator man for the reason that "he had no authority to go back;" and that he never brought any action to test his right to be reinstated in the position or the right of defendant in laying him off. Plaintiff also introduced in evidence his declaration in the former action, the judgment therein rendered and the payment of the amount thereof to him. He also showed that appropriations had annually been made by defendant for said position and the amounts appropriated. His attorney made certain computations, claiming that $[illegible].50, was due plaintiff, after deducting the amount paid in satisfaction of the judgment in said former action. Defendant introduced evidence which showed that at a meeting of defendant's civil service commission, held on November 6, 1913, said commission entered a finding in its records that plaintiff, "holding the position of laborer in the Cook County hospital," had failed to report for duty, and had "abandoned his position in the classified service," and also entered an order that plaintiff be removed and "his resignation recorded in compliance with the terms of section 4 of Rule 7." The said section of the rule, also introduced in evidence, provided in part that "failure to report for duty at the expiration of a leave of absence * * shall constitute a resignation, providing that a county employ-

se, on denying in writing the validity or sufficiency of a resignation recorded against him, shall be given an opportunity to be heard at a time to be fixed by the commission within 30 days from the date of such resignation, but after the lapse of 30 days the validity or sufficiency of such resignation shall not be questioned." Defendant also showed by the testimony of Philip Sharkey, Chief Clerk in the office of the County Clerk, supplemented by certain checks and vouchers produced, that since the time plaintiff was laid off all of the positions of elevator operator at the Cook County hospital had continuously been filled by others than plaintiff, that all the monies appropriated since 1913 for elevator operators had been paid to other employees occupying these positions, and that plaintiff's name has not appeared among said elevator operators since that year. On the above pleadings and evidence the trial court made the finding in plaintiff's favor and entered the judgment appealed from.

After a careful review of the record in the present case we have reached the conclusion that the judgment should be reversed. It appears that since plaintiff was laid off, or removed from his position in the classified service, the position has been filled by other appointees and all monies appropriated for the position have been paid to said other appointees during the entire period in question. Even assuming that he was a de jure employee and never legally removed from his position, we do not think that he is entitled, under the facts and circumstances disclosed, to recover any portion of his present claim. (People v. Schmidt, 201 Ill. 211; People v. Burdett, 283 Ill. 124; McMahon v. County of Cook, 210 Ill. App. 196.) In the Schmidt case, supra, it is said (p. 213): "The general rule is, that if the payment of the salary or other compensation to be made by the government is made in good faith to the officer de facto while he is still in possession of the office, the government cannot be compelled to pay a second time to the officer de jure when he has recovered the office, - at least where the officer de facto

held the position by color of title. * * In our judgment the rule governing payments to a de facto officer is founded in public policy, and applies with the same force to payments made to a de facto occupant of a position of public employment, although not an officer." And in said Schmidt case, our Supreme Court, after stating that the authorities on the question are in hopeless conflict and reviewing some of them, said (p. 217): "The question has never been passed upon by this court, where the salary has been paid, whether it could be recovered again from the city by the de jure officer. If the salary or compensation has been paid in good faith to a de facto employee during the time the position was in his possession, it cannot, on principle and by the weight of authority, be recovered again from the city, county, state or other governmental subdivision by the de jure officer." In the Burdett case, supra, the ruling in the Schmidt case was followed and it was stated that "any contrary holding in People v. Coffin, 279 Ill. 401, is overruled." In said Burdett case, it appears that the relators were employees of the State of Illinois, were under the Civil Service Act, and had been suspended from their positions in October, 1913. In January, 1917, the commission after a delayed hearing ordered that they be reinstated, but without pay for the intervening period during which they had rendered no services and the duties of their positions had been performed by others who had been paid the salaries allowed employees in said positions. The relators filed separate petitions for writs of mandamus to compel the commission to certify and approve pay-rolls for their salaries during the time they were suspended, etc. The lower court held they were entitled to the full salary during said time, less monies earned and received while otherwise employed, and awarded the writs. In reversing the judgments, the cases having been consolidated for hearing in the Supreme Court, the Court said (283 Ill. 196): "One of the

defenses interposed by appellants is that a de jure officer or employee who has been for a time wrongfully prevented from discharging the duties of his office cannot recover from the State the salary for such time when it has been paid to a de facto officer who has discharged the duties of the position during the period of time the de jure officer was prevented from discharging them. This was held to be a good defense in People v. Deneidt, 281 Ill. 211, where the precise question here raised was passed upon and where it was held the de jure officer could not in such case recover."

Furthermore, in the present case, it does not appear that plaintiff, either after he had been laid off, or after the commission had found that he had abandoned his position in the classified service and had in effect ordered his removal therefrom, offered to render any services and made any attempt, by mandamus or other direct action, to determine the question whether or not he had been legally separated from the service. And we do not think that under such circumstances he is entitled to recover anything in the present action for the period mentioned. (Burris v. Board of Education, 221 Ill. App. 397, 406; Kenyon v. City of Chicago, 135 Ill. App. 227, 230.)

And we do not think that plaintiff is in a position to claim any benefit by virtue of the doctrine of res adjudicata or estoppel by verdict. "In order that the judgment should operate as an estoppel it must either appear upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit." (Sawyer v. Nelson, 160 Ill. 629, 631; Smith v. Countree, 158 Ill. 219, 223.) It appears from the declaration of plaintiff's former action that he sought to recover the difference between what had been appropriated for an elevator operator, to which position he had been appointed, and what he had actually received during the

period therein mentioned. It does not appear that in the former action any defense was made, as in the present action, that plaintiff's position had been filled by other appointees who had received for their services the monies appropriated for the position. The precise question here in issue was not raised and determined in the former action.

For the reasons indicated the judgment of the Circuit Court is reversed.

REVERSED.

Fitch and Barnes, JJ., concur.

199 - 28475

FINDING OF FACTS.

We find as facts in this case that plaintiff, Wilson B. Golden, did not fill the position or perform the duties of elevator operator in the Cook County hospital at any time after March 1, 1914; that at no time after he was laid off in 1915, did he tender his services to defendant, County of Cook, or perform any work for defendant, or make any attempt to test in a direct action the sufficiency of his said lay-off or discharge; that during the entire period from March 1, 1914, up to the date of the commencement of the present action, the position of elevator operator in said hospital formerly occupied by him in 1915 and prior thereto, has been filled by other appointees; and that during said period all monies appropriated by defendant for said position have been paid by defendant to said other appointees.

208 - 28484

C. W. ARMSTRONG,
Appellee,

vs.

AMERICAN ASSOCIATION OF ENGINEERS, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

2311A.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The defendant corporation seeks by this appeal to reverse a judgment against it for $1,000. rendered by the Municipal Court of Chicago on October 19, 1922, in an action of assumpsit after a verdict of a jury assessing plaintiff's damages at said amount.

Plaintiff, an attorney-at-law, commenced the action on February 7, 1921. He claimed (1) that he was employed during the months of January and February, 1920, by defendant, through its manager, one W. J. Burke, to examine the law with reference to two grievances concerning two members of defendant association, and to advise defendant as to the proper method of procedure by which to carry out and enforce two rulings and findings of the National Practice Committee of defendant, that he examined the law and authorities as to said matters and had several conferences with said Burke in reference thereto, and that a reasonable charge for his services was $100. He further claimed (2) that on March 13, 1920, defendant, through Burke, employed him as its attorney to prepare and draft a bill to be presented to the Illinois Legislature for the purpose of regulating the practice of engineering, etc.; that in drafting the bill he consumed about 30 days time, from March 13, 1920, to May 10, 1920, on which last mentioned day he delivered to defendant, through Burke, several copies of the proposed bill; and that a reasonable charge for

CHICAGO BAR ASSOCIATION

his services in this regard was $1,900. He further claimed that he had not received any pay for his work and demanded judgment against defendant for $1,600.

Defendant, in its amended affidavit of merits, denied (1) that Burke was its agent or employee, (2) that he had any authority to employ an attorney for it, or (3) that it had ever employed plaintiff to perform any services for it at any time.

It appears that defendant is a corporation, not for pecuniary profit, organized under Illinois laws, with principal office in Chicago; that the purpose of its organization was to raise the standard of ethics in the engineering profession and to promote the economic and social welfare of engineers; that its membership consisted of more than 20,000 professional engineers, about one-half of whom had voluntarily formed local clubs or chapters in different parts of the United States; that members residing in Chicago and vicinity had formed an unincorporated local chapter, known as the Chicago Chapter of the American Association of Engineers, of which Paul Augustinus was president, and who was not an officer or employee of defendant; that each chapter, including that in Chicago, was a self-governing body; that Burke was the manager of the Chicago Chapter and had been employed as such by Augustinus, and was not an employee of defendant; and that one C. E. Drayer was the secretary of defendant, was in charge of defendant's office, conducted its affairs generally, and carried out all orders of defendant's board of directors and executive committee. Drayer testified in substance that, as the chief operative of defendant's office, he was superior to all of the subordinate officers of the various chapters, but did not have the power to discharge any of them; that he might request a chapter officer at times to do a thing which in his judgment might seem wise in carrying out the work of the association, "but not necessarily does he do it;" and that, while he generally persuaded such an

CHICAGO BAR ASSOCIATION

officer to comply with his request, the officer was not obliged to do so, as the association did not dominate or control the actions of the various chapters. It further appears that defendant had rented office space in the National Life Building on La Salle street in Chicago; that this space was used by both defendant and the Chicago local chapter up to about September, 1919, when defendant moved its offices to another building on Adams street; that thereafter defendant had a private wire running from its switchboard to the Chicago Chapter over which conversations might be had between the two offices without the intervention of the telephone company; that in October, 1919, one Gaffney rented from defendant part of the space formerly occupied by it in said National Life Building, who in turn sub-leased an office to plaintiff until about May 1, 1920, when he rented an office from the Chicago Chapter through Burke.

As to plaintiff's services for which he claimed $100, the evidence discloses that on October 24, 1919, Drayer, as secretary of defendant, wrote Burke concerning the said two grievances, enclosing a copy of the report of the Practice Committee of defendant thereon, and saying that he (Drayer) had asked Burke and another "to carry out the findings of the Practice Committee," and further saying: "Do you know whether this case can be handled through the Legal Aid Society, in which case it would probably be without cost to either Mr. Osner or to ourselves? If it cannot be handled in that way I would say that we would proceed, National Headquarters taking the responsibility, and that we would not charge against Osner more than one-half of the amount he receives." Plaintiff testified in substance that Burke called on him, gave him the letter and enclosure, and asked him to handle the two cases for defendant, as the latter was vitally interested in the questions raised; that plaintiff studied the questions, examined authorities and expended about three days' time in the work, and

shortly thereafter gave Burke an oral opinion as to the cases, asked him if he wanted a written opinion, but that the latter replied he did not think it necessary, but if it became so he would notify plaintiff; and that a reasonable charge for the work done was $100. Burke admitted that he turned over the letter to plaintiff and asked for an opinion, but denied that plaintiff had ever given him such opinion, either oral or written. Without further discussion of the evidence bearing on this claim for $100, we are of the opinion that the jury would have been warranted in finding that plaintiff in good faith performed legal services for defendant of the reasonable value of $100, and that defendant is liable therefor, it having authorized the performing of the services by Drayer's letter, communicated to plaintiff through Burke.

As to plaintiff's services for which he claimed $1,500, defendant's counsel contend that the trial court should have directed a verdict in defendant's favor, and, in our opinion, there is merit in the contention. We do not think that the evidence discloses such express authority by defendant for the performing of the services as warrants any recovery on this item against defendant, or facts from which any such authority by defendant may reasonably be implied. It is apparent from certain of the court's rulings, and from certain given instructions that the court eliminated the question of implied authority or estoppel from the consideration of the jury and submitted the case to them solely upon the question of express authority, and, mainly, because of the testimony of plaintiff's witness, Lucille M. Mitchell, a stenographer. She testified in substance that when defendant moved its offices to the building on Adams street, she remained in the employ of the Chicago Chapter in its quarters on La Salle street; that she remembered when Burke turned over to plaintiff certain papers some time in the spring of 1920; that plaintiff called on Burke and went into the latter's office and was closeted with him for quite a long

time; that when plaintiff came out of the room she was at her desk just outside the door and he had a file of papers in his hands which she recognized as relating to the "license law committee" matter; that immediately after plaintiff left the office Burke called "National Headquarters" over said private wire and asked for Drayer; that she afterwards heard Burke say over the telephone that he had turned over the "license committee matter" to Armstrong; that she did not remember what else Burke said over the telephone at that time; that she did not know who was on the other end of the wire, but presumed it was Drayer; and that she did not hear what Drayer said. Both Burke and Drayer denied that any such telephone conversation was ever had between them. But, assuming that it occurred, it discloses merely an act and statement of Burke, the alleged agent of defendant. It is well settled that "an agent cannot confer power upon himself, and therefore his agency or authority cannot be established by showing either what he said or did" (Merchants' National Bank v. Nichols & Co., 223 Ill. 41, 49.) Plaintiff testified that his conversations relative to the drafting of a bill to be presented to the legislature were had with Burke and that he rendered his bill for his services to Burke in the name of the Chicago Chapter, and not to defendant. Burke testified that he asked plaintiff to draft the proposed bill of his own initiative. And Drayer's testimony was to the effect that he never directed Burke to employ an attorney to draft any such proposed bill and that the first he knew of plaintiff's claim against defendant was when notice of the commencement of the present action was received.

Inasmuch as, in our opinion, the evidence would have warranted the jury in finding defendant liable for plaintiff's claim of $100, but did not warrant any finding against defendant on plaintiff's claim of $1,500, and as (the jury having returned a verdict of $1,000) we cannot tell whether or not they included in their verdict said $100 claim, or any part thereof, the

judgment should be reversed and the cause remanded, and it is so ordered.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

216 - 28492

In the matter of the estate of DANIEL J. DAVIS, deceased.

BENJAMIN F. DAVIS and JESSICA D. MURPHY,
Appellants,

vs.

MAUD R. DAVIS, individually and as administratrix of said estate, WILLIAM C. DAVIS and HENRY G. W. REINHARDT,
Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

231 I.A. 398

STATEMENT BY THE COURT. By this appeal Benjamin F. Davis and Jessica D. Murphy, son and daughter of Daniel J. Davis, deceased, seek to reverse a judgment of the Circuit Court of Cook County, entered October 26, 1923, wherein the court, after a hearing without a jury on appeal from the Probate Court of Cook County, dismissed their petition, in which five other parties had originally joined as co-petitioners. Said other parties, as creditors, had had claims allowed against the estate, but more than four years prior to the filing of the petition they had sold and assigned their claims for 25 cents on the dollar to the respondent, Henry G. W. Reinhardt. The judgment appealed from was entered following a finding of the court to the effect that the respondents, and each of them, were not guilty of the acts of fraud charged in the petition, and that petitioners were not entitled to the relief prayed for.

On January 19, 1911, Daniel J. Davis died intestate, and on January 25, 1911, Maud R. Davis, his widow, was appointed administratrix of his estate. On November 1, 1917, the petition referred to was filed in the Probate Court against Maud R. Davis, individually and as administratrix, William C. Davis

(a cousin of appellants), and Reinhardt. It was very voluminous and charged numerous acts of fraud and misconduct on the part of the respondents in connection with the settling of the still pending estate. It prayed in substance for the removal of the administratrix; for the disallowance of her individual claim as a creditor (allowed on June 29, 1912, for $31,141.01); for the correction of the inventory and accounts; for the restitution of certain assets by the administratrix and William G. Davis; that the assignments to Reinhardt of the allowed claims of the five co-petitioners be held to be actually partial payments to them as creditors, and that the balance be paid to them and the residue of the estate to the heirs. Maud R. Davis filed answers, one as administratrix and the other as an individual, and upon amendments to the petition being filed it was ordered that the answers stand to the petition as amended. On June 30, 1919, there was a hearing on the petition in the Probate Court, resulting in that court finding that the equities were with the respondents and that the petition was without merit, and adjudging that the same be dismissed "for want of equity." An appeal was taken to the Circuit Court, and on December 1, 192[illegible], on a hearing de novo, the petition was dismissed "for want of jurisdiction." It appears that the trial judge was of the opinion that petitioners should have proceeded by bill in chancery, rather than by petition in the Probate Court, and that the Probate Court was without jurisdiction to determine the questions raised. From this order petitioners appealed to this appellate court and on January 17, 192[illegible], the order was reversed and the cause remanded to the Circuit Court. (Davis v. Davis, 224 Ill. App. 628.) In the opinion this appellate court said: "The appeal from the Probate Court to the Circuit Court transferred full jurisdiction of the subject matter and the persons to the Circuit Court, and we are of the opinion that the Circuit Court should have heard and decided the cause upon its merits." The cause was re-docketed

in the Circuit Court. On August 8, 1922, William C. Davis there filed his answer to the petition, and on October 14, 1922, Heinhardt filed his answer. During the trial, on October 17, 1922, the court entered an order restraining Maud M. Davis, individually, from selling, assigning, pledging or disposing of any of her shares of stock in the Davis-Watkins Dairymen's Mnfg. Co. until the further order of the court.

The five other parties who joined in the petition are: Eliza A. Davis (divorced wife of the deceased), Deyo-Macey Engine Co., Schaperkotter Cooperage Co., McHenry Millhouse Mfg. Co., and the Rex Company (merchandise creditors). Their respective claims as allowed are comparatively small, viz: $115.29, $281.35, $32.24, $15.46 and $64.75, and were all allowed as of class 7 during the year 1911.

It is alleged in the petition, inter alia, that Benjamin F. Davis and Jessica D. Murphy, as heirs of deceased, are entitled to share in any surplus of the estate after the payment of the debts of the deceased, widow's award (allowed for $2,000), funeral expenses and expenses of administration, and that upon a just and true accounting they are entitled to receive a large amount from the estate, to-wit, $25,000; that said five co-petitioners, in January, 1913, were "induced," by reason of the fraudulent devices of the administratrix and of Heinhardt, her agent and confederate, to assign their respective claims for 35 cents on the dollar, she supplying the funds therefor; that the "traffic" in the claims was conducted from the office of her attorneys and was effected "upon false and fraudulent representations that the estate was hopelessly insolvent;" that said co-petitioners are entitled under the circumstances to treat the sums received by them as partial payments and to have the balance of their claims paid from the assets of the estate; that among those assets, as inventoried, are certain shares of the capital stock of the Davis Milk Machinery Co.,

issued to and standing in the name of the deceased; and that of this stock Maud R. Davis claims to own 66 shares, of the par value of $6,600, by reason of their having been delivered to her by deceased during his lifetime as and for her individual property, but that her ownership thereof rests upon her unsupported statement and that said shares should be accounted for as belonging to the estate.

It is further alleged in substance that on June 29, 1918, Maud R. Davis obtained the allowance by the Probate Court of her individual claim against said estate in the sum of $31,121.01, for money alleged to have been loaned to the deceased from time to time during his lifetime; that said claim was based upon a note for $30,049.66, payable to her order, dated November 10, 1916, (about 2 months before the death of the deceased) and purporting to have been signed by the deceased; that the allowance of the claim was procured by fraud, her attorney falsely stating to opposing attorney and others at a certain conference that he knew of his own knowledge that her claim was a valid one, whereby said opposing attorneys were induced not to contest the claim and not to appeal from the order of its allowance subsequently entered; and that the claim was a fraudulent one and that the order allowing it should be set aside.

It is further alleged in substance that, on September 12, 1917, without notice to said heirs, the administratrix procured an order of the Probate Court, upon certain false and fraudulent representations then made, to turn over to herself individually, in full satisfaction and payment of her said claim as a creditor of the estate, certain patent rights belonging to the estate and 353 shares of the stock of said Davis Milk Machinery Co., inventoried as part of the assets of the estate; that she falsely and fraudulently represented to the court that there were no assets of the estate of any value other than said 353 shares of stock, about $1,048 then in bank, about $1800 soon to be realized from the

settlement of a then pending litigation, and, possibly, a further dividend on said stock, that the probable market value of said stock was not in excess of $40,000, that her individual unpaid claim and the Tisdale unpaid claim were largely in excess of the value of said stock and said patent rights, and that the estate was insolvent, that the only allowed claims remaining unpaid were those that had been assigned to Reinhardt and the Tisdale claim of $20,005 (which had been purchased and was then owned by William C. Davis), and that the only other claims were those for her fees as administratrix, for her attorney's fees and the final court costs; that prior to the entry of said order the written consents thereto of Reinhardt, William C. Davis, and of the attorneys of the administratrix were filed; that William C. Davis was then the president of and a stockholder in said Davis Milk Machinery Co., and was desirous of having that company and certain other companies consolidated into a new company; that after the entry of said order said Maud R. Davis sold and assigned said 253 shares of stock to him; that he is not an innocent purchaser of the stock; and that the stock or its equivalent should be surrendered by him as the property of the estate.

Maud R. Davis, after setting forth in her answers certain technical defenses, and after denying all acts of fraud charged and the right of petitioners to the relief prayed for, alleged that co-petitioners had never offered to pay her the 25% of their claims which they had received from Reinhardt; and that one of the attorneys for the petitioners (formerly attorney in the prosecution of the allowed Tisdale claim and in its sale and assignment to William C. Davis) had made such a champertous agreement with petitioners as alone warranted the dismissal of the petition.

William C. Davis, in his answer, denied any fraudulent acts, misrepresentations or collusion as charged. He alleged in substance that he had no connection with or interest in said

estate, except as he was the assignee in good faith and for a valuable consideration of said Tisdale claim; that he had no knowledge that Maud R. Davis fraudulently obtained the order of September 18, 1917, as charged; that he merely consented to the entry thereof as assignee of the Tisdale claim; that after the entry of said order, and after the consolidation of the Davis Milk Machinery Co. and other companies into the Davis-Watkins Dairymen's Mfg. Co., he, acting solely as an officer of the new company, exchanged the stock of the Davis Milk Machinery Co., allotted to Maud R. Davis by said order, for her pro rata share of stock in said new company; and that so far as he knows all of such new stock is now owned by and in the possession of Maud R. Davis.

The defendant Reinhardt, in his answer, denied any fraud in the obtaining of the assignments to him of the claims of the co-petitioners, and alleged that written propositions for the purchase of said claims were made and accepted; that 25% of the face of the claims was paid, and that none of the co-petitioners had ever made any request to have said assignments rescinded, or had offered to return any part of the consideration received therefor.

On the trial petitioners introduced much evidence, oral and documentary.. As the court's finding was entered at the conclusion of petitioner's evidence, the defendants did not introduce any evidence. The witnesses produced by petitioners were William T. Alden, attorney for the estate; Sherman C. Spitzer, attorney for Chicago Title and Trust Co., Mary M. Bartleme, assistant to the Judge of the Juvenile Court in Cook County and in 1911 appointed by the Probate Court to defend said claim of Maud R. Davis against the estate; William C. Davis; Henry G. W. Reinhardt and Maud R. Davis. All these witnesses were examined and cross-examined at length. Petitioners also intro-

duced the depositions of James [illegible]. Simonton and Walter C. Knight, each having formerly acted, at different times, as attorney representing the Tisdale claim. Some of the questions raised and argued upon the trial were (1) Whether the allowance of the claim of Maud R. Davis on June 29, 1918, had been procured by fraud and misrepresentations; (2) Whether the order of September 13, 1917, had been procured by fraud and misrepresentations; (3) Whether at the time of the entry of the last mentioned order the estate was insolvent, for, if so, it was contended that appellants, as heirs, had no financial interest to be protected, and (4) Whether the co-petitioners, having assigned their claims to Reinhardt as aforesaid, and not having offered to return the consideration received for said assignments, were in any position to ask for relief. Maud R. Davis was the last witness called by petitioners. During her direct examination she was asked by petitioners' attorney to produce "the itemized statement on which your claim against the estate is based." Thereupon her attorney objected to the Circuit Court going into the merits of a claim allowed many years previous by Judge Cutting, then judge of the Probate Court, until the court was first satisfied by evidence that the original allowance of that claim had been procured by fraud and misrepresentations, and further stated that such had been the ruling of the Probate Court when the hearing on the petition was there first had. Thereupon petitioners' attorney admitted that under the law he would be required to show in the first instance that the allowance of the claim had been procured by fraudulent means. Thereupon the court suggested that in view of the agreement of counsel as to the law it was incumbent upon petitioners to first show fraud in the allowance of the claim. Further testimony of the witness was thereafter admitted over the objection of her attorney, and petitioners rested their case. Thereupon the court stated in substance that in his opinion "Judge Cutting was right

in allowing the claim," and that the evidence of fraud as presented by petitioners was not sufficient to warrant the setting aside of said judgment of the Probate Court on said petition. Subsequently petitioners' attorney asked leave to further examine Maud R. Davis on the subject of the consideration of her original claim as allowed, and also that the case be re-opened in order to hear further evidence on the question of compelling restitution of the 253 shares of stock of the Davis Milk Machinery Co., or the stock into which they had been converted, from Maud R. Davis, even upon the theory that her claim against the estate had been properly allowed. Both motions were denied, as was also petitioners' motion for a new trial. On the day the judgment was entered petitioners' attorney again moved the court to re-open the case, supporting the motion by certain affidavits, but the court denied the motion, and at that time stated: "While the evidence was before the court, and everything was fresh, the case was quite thoroughly argued. I came to the conclusion then that there was not a sufficient showing of fraud in the case, and the argument now presented by counsel does not change my views."

MR. PRESIDING JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

After a careful review of the pleadings, the evidence and the printed briefs and arguments of opposing counsel, we have reached the conclusion that the finding and judgment of the Circuit Court were right and that the judgment should be affirmed. In our opinion there was not sufficient proof of fraud or wrongdoing on the part of defendants, or any of them, or their agents or attorneys, to warrant any contrary finding or judgment.

As to the claim of Maud R. Davis, allowed for $31,121.01 by the Probate Court, on June 22, 1912 (more than five years before the present petition was filed) it appears that the claim was filed in the Probate Court in October, 1911, was for money loaned to deceased during his lifetime and was based upon a note for $30,049.66, dated November 10, 1910, signed by deceased and payable to the order of Maud R. Davis. On October 28, 1911, Mary M. Bartleme was appointed special attorney to defend the estate against the claim. Apparently no question was raised as to the execution of the note, but, because of the size of the claim and the signing of the note shortly before the death of the maker, Miss Bartleme and others were doubtful as to the consideration. It does not appear that appellants at the time made any independent investigations as to the validity of the note or objected to the allowance of the claim. The Probate Court continued the hearing from time to time to enable Miss Bartleme and certain interested parties to investigate the merits of the claim. An itemized statement showing details as to the consideration for the note was furnished by the claimant to Miss Bartleme and to the attorneys for said interested parties, and they examined certain papers and memoranda. Miss Bartleme testified in substance that she examined carefully into the merits of the claim; that shortly before the claim was allowed there was a conference held at the office of the attorney for the claimant, at which the memoranda

mentioned were produced, and the claimant and her attorney questioned by the parties present; that as a result of the conference and of other investigations made by her she became convinced of the validity of the claim and subsequently in open court consented to its allowance; that no fraud or deceit was practiced upon her; and that she was satisfied that a full and honest hearing had been had on the merits of the claim. The testimony of Alden was substantially to the same effect. Haight, then representing the Tisdale claim, testified in substance that he was present at the conference, that certain memoranda were produced and claimant's attorney made certain statements, that he did not closely scrutinize the memoranda but took Alden's word as to what was contained therein, that Alden seemingly "acted fairly," that he felt that he was not neglecting his client's interests in taking Alden's word, that afterwards when the claim was allowed in court he prayed an appeal from the order of allowance "as a matter of form," and "in order to get time to hear from my clients," but that they decided not to appeal and no appeal was taken from the order allowing the claim. In view of the foregoing facts and circumstances we think it clear that the Circuit Court, possessing equitable powers, would not have been justified on appeal from the Probate Court in setting aside the judgment of that court allowing said claim. In Ford v. First National Bank, 201 Ill. 180, 188, it is said: "An allowance of a claim against an estate is a judgment conclusive upon the creditors and all other parties, so far as the personal property of the estate is concerned. It is not the purpose of the law that the claimant shall litigate his claim first with the executor and then with each and every other claimant of the estate." In Sherman v. Whiteside, 190 Ill. 576, 578, it is said: "The County Court has such equitable jurisdiction in the administration of estates that it may in a proper case, on motion, at a subsequent term set aside an order allowing a claim

where fraud or mistake has intervened (Schlink v. Maxton, 186 Ill. 447.) The facts alleged and proved to enable the court to set aside the claim must be such as would move a court of equity to entertain jurisdiction and set aside the judgment. * * In the absence of fraud, the judgment of the County Court allowing the claim is conclusive against both the executors and the legatees in respect to the personal estate. If an executor has been delinquent in his duty the persons interested in the estate have their remedy on his bond, but a claimant cannot be forced to litigate his claim first with the executor and afterwards with the legatees, or with heirs, where there is no attempt to subject real estate which has descended to the heirs to the payment of the claim." In Ward v. Durham, 134 Ill. 195, 204, it is said: "To entitle a defendant to relief against a judgment or decree on the ground of fraud, accident or mistake, it must be made evident that he has a defense upon the merits, and that such defense has been lost to him, without such loss being attributable to his own omission, negligence or default. The loss of a defense, to justify a court of equity in removing a judgment, must in all cases be occasioned by the fraud or act of the prevailing party, or by mistake on the part of the losing party, unmixed with any fault of himself or agent. * * Mere irregularity, or the insisting upon rights which, upon a due investigation of those rights, might be found to be overstated or overestimated, is not the kind of fraud which will authorize a court of equity to set aside a judgment. * * " It is said in Galena and Southern Wisconsin Railroad Co. v. Ingar, 116 Ill. 56, 63: "It cannot be allowed, as a ground of setting aside a judgment, that there was false testimony given on the trial or false assertions as to liability previously made. If this were admitted, there would be little stability in judgments." (See, also, Kretschmar v. Ruprecht, 230 Ill. 492, 494.) In United States v. Throckmorton, 98 U. S. 61, it is said, after a review of the authorities, (p. 68): "We think these decisions establish the

doctrine on which we decide the present case; namely, that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to fraud, extrinsic or collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered. That the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases." In the present case, in order to warrant the court in setting aside the judgment allowing said claim, we think that petitioners would be obliged to show by convincing evidence, either that there was collusion between Miss Bartleme and Mrs. Davis, or the latter's attorneys or agents, in procuring the allowance of the claim, or that such deceit or fraud was practiced upon Miss Bartleme by Mrs. Davis, or by the latter's attorneys or agents, as prevented the former, although free from any negligence, from interposing a defense to the claim. There was no evidence showing any collusion or fraud on the part of Miss Bartleme. Indeed, the attorney for petitioners stated on the trial that no charges of fraud were made against her. And the evidence did not show that she was in anywise impeded in her investigations as to the merits of the claim or fraudulently prevented from interposing any valid defense to its allowance.

Considering the said claim of Maud R. Davis as a valid claim against the estate, and also considering the allowed Tisdale claim of $20,005, together with the other allowed claims, it sufficiently appears from the evidence that the estate was in an

insolvent condition when the order of September 12, 1917, was entered. In other words, the total assets of the estate were not sufficient to pay all of the smaller claims in full, the widow's award, funeral expenses and the costs of administration, and also pay said two large claims in full, including interest thereon. It also sufficiently appears that appellants, heirs of deceased and, as alleged in the petition, financially interested only in the surplus of the estate after the payment of all just debts, expenses, costs of administration, etc., them had no moneys coming to them from the estate. Such being the case they are in no position to complain of the entry of said order of September 12, 1917, in the absence of proof of fraud in connection with its entry. We have carefully scrutinized the evidence and do not find such evidence of fraud on the part of the defendants, or any or either of them, or on the part of their agents or attorneys, as would have warranted the court in setting aside the order. And we do not think that the charges relating to the "traffic" in claims, and the charges of fraud against Reinhardt, in purchasing the allowed claims of the co-petitioners for 85% of their face, and, as assignee of said claims, in consenting to the entry of said order of September 12, 1917, have any merit. It sufficiently appears that the claims were duly assigned by the co-petitioners to Reinhardt, that no intentional fraud was practiced on them in procuring the assignments and that they are in no position to urge the setting aside of the assignments or to obtain the balance of the face of their allowed claims.

For the reasons indicated the judgment of the Circuit Court, dismissing petitioner's petition, is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

223 - 28499

LOUISE REED,
Appellant,

vs.

MAMIE PECK,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 598

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On September 30, 1922, plaintiff commenced an action in replevin against defendant, a dressmaker, to recover the possession of a certain white, beaded dress. The bailiff took the dress from the defendant under the writ and delivered it to plaintiff. After a trial before the court without a jury, at which considerable testimony was introduced by both parties, the court found that the right to the possession of the replevied dress was in plaintiff, but that the dress, at the time it was taken from defendant under the writ, was rightfully held by defendant for the payment of $60, then owing to defendant from plaintiff. And the court, on November 21, 1922, adjudged that plaintiff, within five days, pay to defendant said sum, with legal interest, etc.; that in case such payment be made plaintiff might retain the dress; that in default of such payment within the time defendant recover possession of the dress and that a writ of retorno habendo be issued. From this judgment plaintiff appealed.

No useful purpose will be served in a discussion of the testimony. Suffice it to say that after a careful examination thereof, and of the printed briefs and arguments of respective counsel, we are of the opinion that the finding is not against the weight of the evidence as contended, that

the court did not on the trial commit any prejudicial error, and that the judgment should be affirmed. Accordingly, such will be the order.

AFFIRMED.

Fitch and Barnes, JJ., concur.

232 - 28508

HERBERT J. JOHNSON,
Appellant,

vs.

FREDERICK H. BARTLETT,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 398

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago against plaintiff upon a directed verdict at the close of plaintiff's case in an action of assumpsit.

In his statement of claim, filed April 27, 1921, plaintiff alleged in substance that on March 28, 1918, he entered into a written contract (copy attached and made a part of the statement) with defendant for the purchase of certain premises in Cook County, Illinois; that under its terms he had paid defendant $3709 on account of principal, $326.33 on account of interest, and $122.11 for taxes, - in all the sum of $4157.44; that on March 28, 1921, defendant declared said contract forfeited and determined, and retained said sums so paid thereunder as liquidated damages, to the retention of which he was not entitled; and that he now owed plaintiff the sum of $3545.33, for "moneys had and obtained." Defendant filed an affidavit of merits in which he admitted that he had declared the contract forfeited and had retained as liquidated damages certain moneys paid by plaintiff thereunder, and alleged that under the terms of the contract he was entitled to do this and that he did not owe plaintiff anything.

It is provided in substance in the contract that, if the purchaser (plaintiff) shall first make the payments and perform the covenants on his part to be made and performed, the

Kennedy C. Jackson,

Kenyon,

Kenyon C. Jackson,

vender (defendant) will cause to be conveyed to the purchaser, in fee simple and unencumbered, two certain lots in Cook County (viz, lot 6 in block 3 in 103rd street subdivision, and lot 978 in Bartlett's "Greater Chicago" subdivision number one); that the purchaser covenants that he will pay to the vendor the sum of $6195 in the manner following: $1368 by assignment to the vender of the contract for the purchase of said lot 6; $19 in cash, receipt of which is acknowledged; and "the balance, $4811, in monthly installments of $75 or more on the 28th day of each and every month hereafter, commencing April 28, 1918, until 45 months from date hereof, at which time the entire unpaid balance of the purchase price shall become due and payable, with interest after one year from date hereof at 6% per annum, payable monthly, on the whole sum remaining from time to time unpaid, and with interest at 6% per annum on all delinquent payments at any time hereafter, and to pay before they become delinquent all taxes, assessments and impositions that may be legally levied or imposed upon said land after the year 1917, and all special assessments levied for improvements not yet made, purchaser to pay all expenses of recording;" that in case of default therein the vendor may, but need not, pay or do what is herein required of purchaser, or whatever else he deems necessary for his protection, and the purchaser shall immediately without notice repay to the vender all his disbursements and expenses connected therewith, including attorney's fees, with interest at 6%; that in case of the failure of the purchaser to make either of the payments, or any part thereof, or to perform any of his covenants, or to keep and observe all the conditions, covenants and restrictions, "this contract shall at the option of the vender be forfeited and determined, and the purchaser shall forfeit all payments made on this contract, and such payments shall be retained by the said vender in full satis-

faction and in liquidation of all damages by him sustained, and he shall have the right to re-enter and take possession of the premises;" that the vendor will not resell above described property for purchaser; that the first general taxes to be paid by the purchaser must be paid in April, 1919; and that the time of payment shall be the "essence" of this contract.

On the trial plaintiff was the only witness called. He was examined and cross-examined. He introduced the contract in evidence and also certain letters and notices hereinafter mentioned. On the back of the contract appeared endorsements by defendant's agents of monthly payments, both of principal and interest, made by plaintiff from time to time. The payments on account of principal were from May 2, 1918, to December 4, 1920, and were of $75 each, with one exception (July 13, 1918) when $150 was paid. The interest payments were from April 25, 1919, to December 4, 1920. The endorsed payments on account of principal aggregated $2325, and on account of interest aggregated $396.33. Some of the payments on account of principal were made before they were due and others after they were due. Plaintiff failed to make the payment on account of principal which fell due on May 28, 1920, but he made payments for the following months in that year a day or two late, up to and including the November, 1920 payment, which was made on December 4, 1920, and which was the last payment made by him on the contract.

Plaintiff testified in substance that in December, 1920, he became somewhat embarrassed financially; that during the latter part of that month or early in January, 1921, he called at defendant's office in Chicago and had separate conversations with two of defendant's agents relative to making a change in the terms of the contract so that, if possible, he might be relieved from making further monthly payments thereon; that he was referred to Mr. Fox, in charge of collections for defendant; that he saw Fox, informed

him of the situation, and asked him "whether he (Fox) could help him (plaintiff) by relieving him of one of these lots or fixing up the contract in some way so that he (plaintiff) could pay up on one of the lots and not be obliged to make any more of these 75 monthly payments;" that Fox replied that "there could be no cancellation of all or any part of the contract, that defendant might give him temporary relief, but that he would have to pay on the contract just the same in the end;" and that he had no further conversations with defendant or any of his agents.

On January 19, 1921, defendant, per Fox, wrote plaintiff to the effect that the latter's account then showed a deficit of two installments of the principal and that there was interest overdue since December 4, 1920. On January 24, 1921, defendant again wrote plaintiff requesting him to give attention to the account by January 28th, at which time three installments on principal would be due, aggregating $225, and $22.50 in interest. On March 9th, defendant again wrote plaintiff to the effect that "the extension of payment granted" had expired, and demanding an immediate adjustment of the account. Plaintiff further testified that about this time he consulted a certain firm of attorneys to see if he had any redress and if a settlement of the contract could be made. On March 17th, with plaintiff's sanction, the attorneys wrote defendant a letter in part as follows:

> "Our client advises us that he is now in arrears, and you have notified him that this agreement is to be terminated by you unless the payments in arrear are made. He has advised you of his inability to further carry out the terms of this agreement.
>
> We notice that in this agreement it is stated that, upon failure of the vendee to carry out all of the terms and conditions of the contract, all payments made thereunder shall be retained by you in full satisfaction and in liquidation of all damages by you sustained, with an additional right to re-enter and take possession of the premises.
>
> This is to notify you that inasmuch as one lot has been paid for fully, our client expects a deed to this lot, and, upon your failure to make some satisfactory adjustment of this matter, that we are advised to proceed against you for a return of the money regardless

of the above stipulation in the contract."

On March 21st, after said attorneys' letter was received, defendant wrote plaintiff, expressing surprise, in view of special indulgence given, at receiving said attorneys' peremptory demand for a settlement, and saying that the settlement demanded is "entirely opposed to the purpose and intent of the contract and it will not be granted," and further saying that defendant stands ready and willing to perform the contract on his part and to open negotiations with plaintiff "involving a reasonable degree of further indulgence," but that nothing is to be gained by a course of mere delay, and that plaintiff will find enclosed "a letter preliminary to cancellation of contract," and that defendant will "put this into effect promptly if, within the time specified, you do not call at the office either to make payment or to conclude with us a reasonable schedule under which the deficit now accrued shall be adjusted." The enclosed letter was in the form of a notice, calling attention to the provisions of the contract as to forfeiture and the retention by defendant of prior payments as liquidated damages, and that installments aggregating $300 and certain interest were past due and unpaid, and notifying plaintiff that unless he made payment of the amount due "within five days" defendant "will declare said contract forfeited and determined." On March 28th, defendant, not hearing further from plaintiff, declared the contract forfeited and on the same day gave him written notice to that effect. Plaintiff further testified that at no time after receiving such notice of forfeiture did he tender any money to defendant.

Plaintiff's counsel contend in substance that the judgment should be reversed because defendant waived his right under the contract to forfeit it because of delinquent payments, and, having rescinded it without right, plaintiff not objecting to the rescission, it must be held to have been rescinded by

mutual consent, and that plaintiff is entitled in this action to recover, as for money had and received, the amounts paid under the contract. Counsel claim that this waiver is shown by the fact that many of the installment payments were accepted by defendant after they became due, thereby disclosing that for a portion of the time defendant did not insist upon payments being made at the exact time specified, and that under such circumstances a reasonable notice must be given by defendant of his intention to return to the strict and exact terms of the contract before a forfeiture can properly be declared, and such reasonable notice was not given in the present case. We do not think there is any merit in this "waiver" contention. It appears from the evidence that plaintiff's installment payments, with the exception of the one falling due on May 28, 1930, were well kept up, and the record is silent as to the conditions under which the delinquent installment was carried. The most that can be said is that plaintiff had been allowed to drop back one installment payment, and that some of the other installment payments had been accepted when a few days overdue. And the inference from the entire record is strong that defendant was insisting all along, with the one exception mentioned, on a compliance by plaintiff with the terms of the contract as to payments. Plaintiff was not lulled into a sense of security by defendant's acts, or led to believe that the installment payments might be considerably delayed without danger of forfeiture. Furthermore, plaintiff's testimony as to his interview with Fox, defendant's manager of collections, shows that in the early part of January, 1931, when he sought to be relieved of making further installment payments, etc., he was notified that defendant would not consent to the cancellation of <u>any part</u> of the contract. Again on March 21st, after his attorneys with his sanction had written the letter above referred to, he received notice from defendant that the strict

terms of the contract would be enforced unless the installments, then overdue, were paid within five days. Defendant did not forfeit the contract until March 28th, and clearly plaintiff is in no position to say that reasonable notice was not given him of defendant's contemplated action in case further payments were not made. (Lang v. Hedenberg, 277 Ill. 366, 377; Harding v. Olson, 177 Ill. 298, 302.) It also appears that, had plaintiff evinced any disposition to endeavor to fully carry out his part of the contract, arrangements could have been made which would have given him further time as to delinquent and future payments, but, deciding not to go ahead with the contract, he demanded a settlement at variance with his contract obligations. It is well settled law that, where valid contracts are fairly and understandingly entered into, it is the duty of the courts to enforce them as made; and "all the authorities recognize that competent parties may make a contract as to penalties and forfeitures, and that courts of equity, as well as courts of law, will recognize the rights of the parties as to such penalties and forfeitures." (Lang v. Hedenberg, supra.)

In our opinion, under the facts and circumstances disclosed, the Municipal Court did not err in directing the jury to find the issues in favor of defendant, and, upon such verdict being returned, in entering the judgment appealed from. The judgment, therefore, is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

244 - 28530

In re Petition of
ARTHUR J. HOPPE,
Insolvent Debtor,

ARTHUR J. HOPPE,
Appellant,

vs.

SAM LEVENFELD,
Appellee.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

231 I.A. 598

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On a petition of Arthur J. Hoppe, filed in the County Court of Cook County on June [illegible], 1923, for his release from imprisonment under the provisions of the Insolvent Debtor's Act, there was a hearing before the court resulting in the entry of an order on September [illegible], 1923, remanding the petitioner to the custody of the sheriff, and this appeal followed.

It appears that on September 1, 1920, Sam Levenfeld commenced an action in the Circuit Court of Cook County against Hoppe and others for damages for personal injuries sustained by him in an automobile accident which occurred in Chicago on April [illegible], 1920; that Levenfeld's declaration as originally filed consisted of four counts, none of which charged malice, to which declaration Hoppe filed a plea of the general issue; that subsequently Levenfeld filed an additional count in which malice was charged and was the gist of the count; that on February [illegible], 1922, on a trial being had, the jury returned a general verdict finding Hoppe guilty and assessing Levenfeld's damages at $7,000, upon which verdict judgment for that amount was entered against Hoppe; that execution was issued on the judgment and Hoppe filed a schedule, reciting ownership of necessary wearing apparel and one automobile subject to a chattel mortgage, but that he

had no cash on hand and no debts due and owing to him; that the sheriff returned said execution unsatisfied; and that thereafter Hoppe was arrested on a capias ad satisfaciendum issued out of the Circuit Court.

On the hearing before the County Court the facts as above recited were put in evidence by the petitioner, Hoppe, and then he rested his case, whereupon the attorney for Levenfeld moved that the petition be dismissed and Hoppe be remanded into custody. The court, however, informed Hoppe and his attorney that he was ready to hear further evidence as to whether or not malice was the gist of said action in the Circuit Court, whereupon Hoppe's attorney said he had no further evidence to present, and thereupon the court entered the order appealed from.

We are of the opinion that the court did not err in entering the order. In Muhler v. Einsheimer, 30 Ill. App. 401, 407, it is said: "It appearing from the face of the record that the recovery may or may not have been upon a count where malice was the gist of the action, it was for the petitioning debtor, who was seeking to avail himself of the right given by the statute, to show that the case was within the proviso of the statute, that is, that he was imprisoned in a civil action, where malice was not the gist of the action. As he failed to make such proof, the court was clearly in error in charging the jury to find that malice was not the gist of the action, and the verdict of the jury so finding was not supported by the evidence." In Jornberg v. Mix, 199 Ill. 354, the appellant petitioned the County Court to release him from imprisonment under a capias issued by the Superior Court of Cook County upon a judgment in a cause wherein appellee was plaintiff and appellant was defendant. After a hearing the County Court denied the prayer of the petition and remanded the petitioner to the custody of the sheriff and the petitioner

appealed. This order was affirmed by the appellate court, and the Supreme Court affirmed the judgment of the appellate court, saying in its opinion (p. 257):

> "Appellant contends that if there is a count in the declaration of which malice is not the gist, the party must be discharged in the absence of evidence that the verdict was returned under some other count of which malice was the gist. In this case malice was not of the gist of the first two counts, which were in trover, but it was the gist of the third count, and appellant insists that there was no legitimate evidence upon which count the verdict was returned, and therefore the county court should have discharged him. * * * Where, as in this case, there are several counts, and malice is the gist of some and not of others, the judgment is not conclusive that there was malice, or that the party was actuated by improper or dishonest motives, because the verdict may have been returned upon a count which did not include that element. In such a case, a petitioner for his discharge is not estopped by the judgment to show that malice was not the gist of the action against him, but that the verdict and judgment were based upon a count where malice was not of the gist of the action. (Kitson v. Farwell, 132 Ill. 327.) In this case there were issues on all the counts, and the general verdict that appellant was guilty was responsive to such issues and includes a finding against him upon all of them. Prima facie, the record shows that malice was of the gist of the action, and appellant made no effort to prove that the verdict was returned under a particular count of which malice was not the gist. Appellant, being lawfully imprisoned, was required to bring himself within the provisions of the statute to entitle him to a discharge, and he failed to do so."

The order of the County Court is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

38 - 28300

BESSIE L. McGREGOR, Defendant in Error,	
vs.	ERROR TO CIRCUIT COURT, COOK COUNTY.
JOHN SIEGEL, Plaintiff in Error.	231 I.A. 31

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was an action for deceit in which defendant in error (plaintiff below) obtained a judgment for damages in the sum of $1,050, (with interest) which she had paid on a contract for the purchase of a leasehold to a rooming house, and of the furniture therein.

Plaintiff began negotiations for the same in the early part of May, 1916. The lease ran to one Chournard who assigned it to plaintiff in error, Siegel, defendant below. After considerable negotiation plaintiff and defendant entered into an arrangement whereby defendant was to assign the lease and sell the furniture and furnishings of the rooming house for $3,000. Plaintiff paid $50 down as earnest money on May 17, and on May 31, $1,000, and on June 1 executed a chattel mortgage for $1950 on said furniture, of which she was to be given possession June 5.

Plaintiff made several visits to the house to see the rooms but on one pretext or another was not shown through the entire house nor permitted to see the linens, as she several times requested. Matters dragged until about June 16 when plaintiff claimed to have found on a visit to the house, still occupied by defendant, that the latter had substituted cheaper and worn curtains at some of the windows for those of better material, and that his wife was packing linens included in the

sale, and she thereupon rescinded the contract and demanded back her money. An inventory was made out itemizing the articles in each room which was used in obtaining a description of them in the chattel mortgage. Outside of that document there is no writing to show what specific curtains or linens were included in the sale.

Plaintiff claiming that she had been deceived and induced to make such payments by misrepresentations brought suit based upon that theory. While defendant said he was always able, willing and ready to carry out his part of the contract, it does not appear that he ever tendered a bill of sale or possession of the premises, or of the personal property, or was able, when the contract was to be consummated, to obtain the lessor's assent to an assignment of the lease. Under such circumstances plaintiff was entitled to the return of her money. But her suit was not predicated on a breach of contract but on the theory of false and fraudulent representations.

Among the alleged misrepresentations was that defendant said he would and could procure from the owner an assignment of the leasehold. While there appears to have been some foundation for the representation when made, yet it is not such a representation as furnishes ground for such an action, not being of a past or existing fact but in the nature of a promise or expression of opinion.

The next alleged false representation is that defendant was the owner of a piano included among the chattels. But we find no evidence in the record to show that he was not.

The next alleged false representation is that certain rooms were rented at $7 per week, and that the cost of coal necessary to heat the house during the winter was $900. We find no testimony to the contrary, to say nothing of the character of the representations.

The count contained no other false representations what amounted to mere promises and breaches of contract and, therefore, need not be discussed in an action of this kind. If defendant substituted other property, as alleged and claimed, for that which he agreed to sell, and by reason of which plaintiff rescinded the contract, then plaintiff's cause of action was for a breach of contract. But we fail to find evidence to support an action for deceit. While we think it was error to refuse defendant's request for an instructed verdict upon the evidence, yet upon the evidence plaintiff's right to the return of her money is so obvious, we shall, on reversal of the judgment, remand the cause so as afford an opportunity for amending the form of action.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

88 - 28364

MAURICE T. WEINSHENK,
Appellee,

vs.

DAVID H. WEISS & CO.,
a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

281 I.A. 399

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for $2450, entered upon the jury's verdict for that sum in favor of plaintiff in a suit for commissions "in obtaining a buyer for and selling on behalf of defendant" stock of a certain oil company.

Among the grounds urged for reversal is that the verdict was manifestly against the weight of the evidence. In view of our concurrence in this contention we need not touch on other points. A flat issue of fact was raised whether there was any agreement for commissions and whether plaintiff was the procuring cause of the sale of stock to two residents of Wisconsin, a Mr. Dodge and a Mr. Wise.

Plaintiff's sole testimony on these points was in direct conflict with that of several witnesses who aside from David H. Weiss, president of defendant, and L. . Weiss, his secretary, cannot be regarded as interested witnesses. There was no testimony tending to impeach their veracity, and we find nothing in the record to indicate that the testimony of any of these witnesses was not as worthy of credence as that of plaintiff. In fact, we think there are various circumstances tending to support their versions of the affairs testified to rather than plaintiff's. It would therefore be unreasonable, as said in Kiess v. Block & Kuhl Co., 295 Ill.

Mr. Justice Byrne continued the opinion of the Court.

CHICAGO BAR ASSOCIATION

167, that the testimony of the plaintiff alone should be allowed to outweigh that of several witnesses to the contrary. This is especially so where the burden of proof rests upon him and his unsupported testimony is met by unimpeached and corroborated evidence of at least equal weight and credence.

Defendant was selling stock of said oil company. It employed several agents for that purpose and conducted interested parties and prospective purchasers on trips to the oil company's fields in Oklahoma. In February, 1919, plaintiff, with about 50 others, accompanied David Weiss on one of these trips. He concededly went to investigate the oil company's properties for a client who had purchased some of its stock. Among those in the party were said Dodge and said Wise, and Langley, president of the oil company, all of whom had a previous acquaintance with defendant and its officers but none with plaintiff. On the trip plaintiff spoke to several of the fact that he was an attorney and was making the trip in the interest of a client. He was not one of defendant's agents but claimed that before he left on the trip said David Weiss, as an inducement to earn some money "on the side," asked him to "work" with said Dodge and Wise, and that he would give him a commission of 5%, which was denied by Weiss. Both of these parties had been previously induced by certain agents of defendant to buy some of the oil stock and, like plaintiff, were making the trip to investigate the property.

On the return day of the trip while on the train Dodge and Wise each contracted for some stock or an option therefor in exchange for farm land. According to the testimony of Dodge and David Weiss these contracts were made with and drawn by Langley and called for an option for the exchange of stock for such farms. Plaintiff claimed that he drew the contracts and that they were for an absolute exchange of the properties for stock.

CHICAGO 1918

The contracts were not produced, and would naturally be in the possession of Langley, if any one. Neither Langley nor Wise was called as a witness. Wise's absence was accounted for by defendant on the ground of illness. But the obligation of calling them or either of them rested as much on plaintiff as on defendant.

According to the testimony of Dodge and David Weiss, plaintiff, suggesting that he was a lawyer, asked to look over the contracts and made some minor corrections. But whether the contracts were for a sale or an option, or whether drawn by plaintiff or Langley is not particularly important in determining whether he was the procuring cause of the sales, and if it were, we think the preponderance of evidence is clearly against plaintiff's contention.

We need not analyze the evidence in detail or point out the rather unconvincing character of the value of the services plaintiff claimed to have rendered. Suffice it to say that both Dodge and Wise appeared to have gone on the trip through the influence of other agents of defendant through whom they had purchased stock and to whom the commissions were paid under arrangements with which plaintiff seems to have been conversant, and that they were more likely to deal with Weiss with whom they were acquainted and whose standing they had inquired into, rather than a stranger purporting to be on the same mission that they were, namely, to investigate the properties and conditions. As their facilities in that respect were as good as his and they were acquainted with the parties they were dealing with and not with him, and plaintiff was not a salesman, it is difficult even from his own testimony to see what he did to entitle him to claim that he was the procuring cause of the sale of stock to them. Dodge denied that he had any part in making the sale to him. In this he is corroborated by the testimony

of David Weiss. The sale to Wise was made at about the same time and in the same manner, and plaintiff does not appear to have sought him as a witness. Plaintiff made no claim for commissions on the Dodge deal for several months and then sought compensation from the agent to whom they had paid but who was under no obligations to divide them with him. He made no claim for commissions on the Wise deal until about a year later. All these circumstances go rather to confirm the defense than plaintiff's claim of a definite contract with him or that he was the procuring cause of the sale.

Reaching this conclusion we reverse the judgment with the finding of facts that plaintiff did not at the special instance and request of defendant obtain a buyer or buyers for such stock or certain properties as alleged in his declaration, and that he entered into no contract with defendant, express or implied, whereby defendant became indebted to him in any of the forms alleged in the declaration.

REVERSED WITH A FINDING OF FACTS.

Gridley, P. J., and Fitch, J., concur.

105 - 28382

JOSEPHINE CARLSON,
Appellee,

vs.

J. C. CARLSON,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

231 I.A. 399

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of divorce finding that "defendant has committed adultery with one Anna Weissbrodt, between June 1, 1920 and April 3, 1922, inclusive, as charged in complainant's bill of complaint."

The first contention is that the decree does not conform to the allegations of the bill. This contention is based largely on construing the decree in connection with certain oral remarks of the chancellor made before the decree was signed to the effect that the evidence did not show that adultery was committed on the first mentioned date and that the decree should contain only a general finding of adultery. However, not only was the decree when presented changed by the chancellor to read as above, thus indicating a change of view, but we must look to the decree itself and not to the chancellor's oral announcements or remarks which have no binding force unless embodied in the decree. (Waggoner v. Snether, 267 Ill. 32.) We think the decree sufficiently conforms to the allegations of the bill, and may be construed as finding that adultery was committed on as well as between said dates. The contention, therefore, that the dates mentioned in the decree, must be considered as eliminated from the decree by said remarks, and that as there was no specific proof of adultery between said dates, the allegata and probata do not correspond, is untenable.

But it is urged with much earnestness that the evidence completely fails to establish adultery on either of said dates or at any other time. In reaching a different conclusion we deem a discussion of authorities cited on fundamental propositions respecting the burden of proof, the weight of evidence, and kindred subjects, or a critical analysis of the evidence, to be unnecessary. Having fully considered the evidence and appellant's analysis of it we think it amply supports the charges in the bill of complaint, if the chancellor, who had the advantage of seeing and hearing the witnesses, deemed the testimony in support of the bill as credible. The mere fact that several incriminating parts of it were stoutly denied by defendant and co-respondent, both of whom had their reputations to preserve, will not justify rejection of so much evidence from which the findings in the decree may be legitimately inferred.

While the circumstances of the occasion in June, 1920, standing alone would create strong suspicion but might not justify a finding of adultery on that occasion, yet when considered in connection with later occurrences they justify the findings in the decree. If the testimony of complainant's witnesses as to the occurrence of April 3, 1922, be taken as true, then the inferences therefrom not only justify finding adultery was committed on that date but give color to something more than suspicion with respect to the incident in June, 1920, and to the compromising situations in which defendant and co-respondent were seen in the same office on intervening occasions.

We shall not undertake to refer at length to other occasions than that of April 3, 1922, which brought about the immediate separation of complainant from her husband. Actuated by suspicions aroused on previous occasions she followed him soon after he left his home that morning to the building in which he had his office. Going to the ladies rest room in the building

from which defendant could be seen when at his desk, and observing that he was not there and that the curtain of his window was drawn low, she went to his office. The office suite was shared by others. In it at the time were lawyer Levison and his clerk Hachtman. Going to the door of complainant's private room and finding it locked, as she claimed and the evidence tends to show, she broke the glass in the door. She testified that she then saw Miss W. "on her haunches" getting up from the floor in a state of nudity except for shoes and stockings, with clothing in her arms; that Miss W. rushed to a corner of the room and crouched in a slight recess; that complainant then called those in the office to come, saying, "she is nude;" that after a little delay defendant appeared from another part of the room, went to Miss W. and taking her wrap or outercoat from a nail helped her put it on; that he then unloosened the door catch and opened the door; that Miss W. was then standing at the wall opposite with some of her clothes at her feet and others held close beneath her coat. Complainant made a rush for these clothes but was intercepted by defendant when a struggle ensued, which brought others in the room to the scene. Complainant remained in the room for about half an hour during which time Miss W. continued to hold the coat close about her. As Miss Fels, a stenographer in that suite, came into the office, complainant called her attention to Miss W. saying she was undressed under the coat, and asked Miss W. to open her coat, which she refused to do. In the meantime lawyer Greenwald entered, followed closely by lawyer Neuffer, complainant's brother-in-law, who had offices in the same building, and had been sent for by complainant. Some conversation ensued relative to the incriminating appearances and Neuffer also asked Miss W. to open her coat. She again refused to do so and was then sitting near complainant. Neuffer and complainant then took hold of the lapels of her coat and pulled it open, and some struggle ensued upon defendant's coming to her re-

lief. Suffice it to say that according to the testimony of complainant, which in the main was corroborated by Neuffer, Miss Fels, Levison, Hachtman and Greenwald, when Miss W's. coat was thus opened it revealed a state of nudity to her waist. There was corroborating testimony that in the latter's struggle her camisole or brassiere fell to the floor and that when reached for by another defendant picked it up and stuffed it inside of the coat she continued to hold about her, also that her stockings were turned down from the top and that she had no clothing on above them except drawers which came down above her knees.

In explanation of this affair Miss W. testified that on the morning in question she arrived at the office before defendant and went directly into his room where she was accustomed to hang her coat; that she was having her menstruation and being uncomfortable from the tightness of a girdle worn about her waist on such occasion, undertook to loosen it before taking off her coat; that while doing so defendant unexpectedly arrived, accosted her and went directly to his desk; that almost immediately the glass door was broken in; that she had loosened some of her underclothing and that the fastenings of her dress, which opened in front, were torn open in the struggle, causing her breast to be exposed. When asked why she refused to open her coat she answered: "Well, I didn't care to do it in the presence of Mr. Carlson after she had done that." (Referring to Mrs. Carlson's attempt to open her coat.)

Such an explanation will not suffice. If not in the state of nudity charged and described, she had too much at stake to refuse the opportunity to vindicate herself, and it does not comport with innocence that he should have supported her refusal. If she was in such a state of nudity the removal of clothing from above the waist was not necessary to the comfort she claimed to have sought, nor would she presumably go to such extremities in a

private unlocked office, as she claimed, that might be entered at any time. It is not strange that with their reputations at stake each should deny or attempt to explain each incriminating circumstance. But the explanations do not comport with reason or innocence and serve to confirm the verity of the charges. The inferences from the incident are seemingly too palpable to question the finding of adultery on that date. With that fact established it may also be readily inferred that the incident in June, 1930, was not an innocent one and had greater significance than would appear when the circumstances of that occasion are taken alone, especially as it was followed by compromising situations of the parties in the same room, testified to by Miss Fels and the window washer of the building, which were of such a character as to support the inference of illicit intimacy between the two mentioned dates. We think there was ample evidence to sustain the decree, as interpreted, that there was the commission of adultery on the dates mentioned and occasions between them.

We have examined the rulings of the court on the evidence referred to under appellant's third point and without discussing them do not think there was reversible error therein. Nor do we think there was error in allowing the preparation of the certificate of evidence as an item of expense to be paid by defendant, or $500 for solicitors' fees, or in giving the wife custody of the children or the furniture for their home.

Complaint is made of an order with regard to the custody of one of the children entered at a term subsequent to the entry of the decree. This appeal does not bring that order before us.

It is also urged that the court erred in denying defendant's motion to incorporate in the certificate of evidence certain remarks of the chancellor made during the trial. As we must look to the evidence and not to the remarks of the court concerning the same to determine the quantum of proof there was no error in

the court's denial of the motion. Accordingly the decree is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

115 - 28391

WILLIAM F. TEMPEL,
Appellant,

vs.

FERDINAND L. CAPPS,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

231 I.A. 299

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

On December 26, 1912, appellee Capps signed and delivered to appellant Tempel his note for $1,500, payable to the latter's order in monthly installments of $35 each. Under a power of attorney attached thereto a judgment by confession was entered which on motion of defendant for leave to plead was reopened. Defendant pleaded payment and the issue was heard before a jury, which rendered a verdict against plaintiff. Thereupon the judgment by confession was set aside and a new judgment for costs entered on the verdict against plaintiff from which this appeal was taken.

It is urged first that the court erred in not directing a verdict for plaintiff. While the preponderance of the evidence is decidedly in plaintiff's favor we cannot say there was not some evidence requiring submission to the jury. But appellant has not argued that the verdict was contrary to the weight of the evidence, else the judgment would be reversed on that ground without discussion of other alleged errors.

We concur, however, in the contention that evidence immaterial to the determination of the issue and confusing and misleading in character was improperly admitted over defendant's objections.

Plaintiff was a mortgage broker, and defendant, who was a retired lawyer, was engaged in erecting residence build-

ings for which he entered into contracts of sale upon the instalment plan, receiving only a small amount of cash down. To carry on this business he obtained building loans from plaintiff secured by mortgage on the real estate, and also so-called collateral loans secured by assignment of said contracts. Plaintiff sold these securities and if the payments they called for were not made promptly by the obligors he advanced the same charging the advances to Capps in the general account which he kept of such transactions, and crediting him therein if afterwards paid by such obligors.

These transactions continued from 1910 to December, 1916. Capps frequently consulted Tempel and the latter's bookkeeper as to the status of the account. He kept no book account himself and had full access to plaintiff's books and received statements thereof from time to time. After several conversations evidently with a view to a settlement about the status of the account in the fall of 1916 and the receipt of statements thereof in the months of October and November, a settlement was reached December 21, 1916, which was evidenced in part by the following endorsement on the note in question:

> "Chicago, December 21, 1916. Paid on this note Two Hundred Dollars, leaving a balance due thereon of Thirteen Hundred Dollars, the payment thereof is hereby extended from this day the payments to be as follows:
> Three Hundred Dollars in one year from date.
> Three Hundred Dollars in two years from date.
> Three Hundred Dollars in three years from date.
> Four Hundred Dollars in four years from date.
> Interest at six per cent, payable semi-annually.
>
> F. L. Capps."

Plaintiff's testimony as to how the result was reached is perfectly clear and supported by his books. Defendant was 74 years old at the time of the trial and his testimony indicates that his recollections of the settlement are uncertain. Plaintiff's version is that it was found on an examination of the account

then made that Capps owed a balance of something over $2,600, and as some question arose as to the exact amount of interest to be included it was agreed as a basis of settlement that defendant would execute two notes of $1,300 each. It is not questioned that one for that sum was then executed and secured by one of said contracts. Plaintiff testified that in lieu of another new note for $1,300 the principal of the unpaid note in question for $1,500 was reduced by crediting $200, and to be paid as endorsed thereon. Capps admitted his signature to said endorsement for such extension, and that he had signed it and the other note for $1,300 "with full understanding." While he later testified that there was also a verbal understanding that if the settlement "was wrong Tempel would right it and turn back the notes," yet he made no attempt to show anything wrong in such accounting until after this suit was brought, which was about six months after the maturity of the final installment. In view of the fact that he had access to plaintiff's books, and statements therefrom, and a clear understanding that the two notes represented a balance due on all transactions between them, as shown by the general account kept by plaintiff, it is difficult to understand how if there was anything wrong in the accounting it was not then readily apparent, or would not have been discovered before this suit was brought some four years later. Defendant's claim of error is that he was not credited with payments made before the settlement on this particular note, which, however, he knew had been credited to him on the general account, and which at the time of the settlement he chose to have so applied instead of on the note. In effect, therefore, he seeks to receive credit for such payments twice.

The issue whether he had paid the note sued on was reduced to the question whether the alleged payments on the note were treated in the settlement as applied on the general

account. Of that there is scarcely room for question. It is significant that kowing he had signed the endorsement on the note in question calling for future payments he never paid anything thereon or demanded back the note evidencing the obligation.

Prior to said settlement various statements were called for and rendered to Capps. One under date of November 29, 1916, consisting of 11 pages, covered items of account only between 1910 to 1913, with respect to which Capps had claimed errors or improper charges amounting to over $900, but it appeared that plaintiff's books gave defendant credit to offset the same. Said statement showed that a balance of $94.86 was due plaintiff on May 14, 1913. Plaintiff objected to the introduction of it in evidence because it was incomplete and did not show the condition of the account at the time of the alleged settlement, and no attempt was made by defendant to show the balance as it stood at a later date. The jury, who were presumably not book accountants, might easily have been confused and misled by the incomplete statement to think that the balance shown thereon was as it stood November 29, 1916, less than a month before the settlement during which it was not much changed.

Plaintiff had sold the note before the settlement to one Bertling and being obliged to advance to him the installments thereon as they fell due, he kept a separate account of such payments but charged the same to Capps in the general account. This separate account went before the jury. One of its items under date of June 16, 1916, read: "Bal. C. K. No. 281." Although this was explained as a payment made by plaintiff to Bertling for the balance due the latter on the note, which then came back to plaintiff, the jurors might have been misled into believing that this was the balance then due from Capps on the note. Unless supplemented by other proof these incomplete statements had no direct bearing on the amount due on the note in question.

The evidence shows that the general account between the parties on which the settlement was made gave defendant proper credit and charges for all the items covered in these incomplete statements.

Equally misleading was the introduction of a payment made November 26, 1916, by Tempel to Capps of $149.50 on a separate transaction which without a full statement of their accounts was incompetent and improperly made the basis of the fallacious argument that if Tempel paid Capps that amount November 26, 1916, the latter could not on December 21, 1916, owe on this note or transaction had previous to November 26th, the sum of $2,600.

We think it manifest that the trial was conducted in a manner to confuse and mislead the jury on the issue in question. When taken in connection with the entire account, and undisputed evidence respecting the same, these incomplete statements had no tendency to establish the defense that the account as it stood December 21, 1916, and then agreed upon as shown by the endorsement on the note was not correct. They were, therefore, clearly misleading, and the verdict so indicates. These errors are sufficient to require reversal of the judgment and dispenses with the necessity of considering other alleged errors.

The judgment will accordingly be reversed and the cause remanded for a new hearing on whether the original judgment by confession shall stand, and for such orders as are necessary to that end.

REVERSED AND REMANDED.

Gridley, P. J., and Fitch, J., concur.

147 - 26423

ELLA H. WENDELL,
Appellant,

vs.

JOHN MACKENZIE et al.,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant filed her bill in equity to have a deed from her to appellee Mackenzie declared a mortgage and asked for an accounting and other relief. The bill was dismissed for want of equity in accordance with the recommendation of the master to whom the cause was referred to take testimony and report his conclusions of fact and law. An appeal was taken to the Supreme Court on the theory that a freehold was involved, but that court held to the contrary and has transferred the appeal to this court. (307 Ill. 109.)

In substance the bill charges that complainant and her husband Trugett C. Wendell, on March 8, 1920, deeded her property known as 1538 West Adams street, Chicago, to said Mackenzie to secure a debt to him of $905, upon an express agreement and understanding that the deed was given simply as security for the payment of such sum, and that upon payment thereof Mackenzie would reconvey the property to her; that he has collected rents therefrom in excess of that sum and has refused to reconvey on her request, and has encumbered the property by a trust deed to one Nelson, as trustee, and later by deed to one Mrs. Ansell, both of which conveyances complainant believes were without consideration and given for the purpose of encumbering the record, and the bill asks for appropriate relief, including an accounting, appointment of a receiver to collect

rents, release of the trust deed to Nelson, delivery of the notes secured thereby for cancellation, and reconveyance of the premises by Mrs. Ansell.

Mackenzie denied that the deed to him was a mortgage and that complainant was entitled to the relief prayed. Nelson and Mrs. Ansell were made parties defendant to the bill, but do not appear to have answered.

The record discloses that T. C. Wendell, complainant's husband, was in the real estate business and acted for her in various transactions in which he obtained loans from Mackenzie, giving trust deeds of complainant's real estate as security. He acted as her agent in negotiating the transaction in question.

The warranty deed in question was dated and acknowledged March 8, 1920. Mackenzie testified that the consideration therefor was $6,000 which consisted of his assumption of a first mortgage of $4,000 covering said property and also another piece of real estate belonging to complainant known as 1851 Jackson Boulevard, his release of a third mortgage on the property in question, (the amount due with interest on the two mortgages released being $978.34) taxes to the amount of $160, and $861.16 in cash. He further testified that after the transaction had been consummated said Wendell requested an option to repurchase the property, and that he then signed the document produced in evidence by complainant, which reads:

"March 12, 1920.

In regard to the property at 1538 Adams St., it is agreed at the Option of the parties hereto to reconvey said property upon the payment of One Thousand ($1,000.00) Dollars or security to cover same amount within thirty days from March eight 1920.

John Mackenzie."

Mackenzie also testified that the date "March 12, 1920," was not on said document at the time he signed it, and that Wendell later wanted the document changed, and that on March 11, 1920, he

signed another document produced by defendant in evidence, reading as follows:

"T. C. WENDELL & CO.

March 11, 1920.

I hereby grant to T. C. Wendell an Option to buy the property at 1538 Adams St. for One Thousand ($1,000.00) Dollars, Subject to Mortgages thereon. This Option expires in thirty days.

John Mackenzie.

OK T. C. Wendell."

Wendell claimed that there was still another document evidencing the agreement to reconvey and that it was lost, and denied that the signature to the document dated March 11 was his. He also claimed that the agreement for an "option" - he protested against the use of the term, but accepted it in view of the necessities which confronted him, - was talked over and made prior to the execution of the deed and other papers. He also denied receiving $861.16 in cash. He, however, gave a receipt therefor dated March 8, 1920, but claimed that he protested against the use of the term "cash" therein, and that said sum merely represented the amount with interest then due on said released mortgages.

In support of the claim that no cash was paid appellant argues that the option to reconvey having been fixed at $1,000, approximately what was due on the two released mortgages, if appellant had paid cash as aforesaid appellee would have fixed a sum large enough to include it, which would have been about $1840. On the other hand, appellee argues that it was contemplated that in addition to the $1,000 appellant would on exercising the option pay the amount due on the two mortgages so released.

It is mainly to these instruments for the so-called options, together with the attendant circumstances, that we must look to determine the intention of the parties, for the transaction

must be viewed in the light of all the surrounding circumstances to ascertain that intention, and it is a recognized rule in this State that where there is a conveyance by deed and a defeasance in a collateral paper or a contract for a resale, and the evidence leaves it in doubt whether the transaction was intended as a conditional sale or a mortgage, it will, as a general rule, be treated as a mortgage. (Preschbaker v. Fuman et al., 32 Ill. 476; Rue v. Dole, 107 Ill. 275; Jeffery v. Robbins, 167 Ill. 375-384; Cassem v. Heustis, 201 Ill. 208; Casper National Bank v. Jenner, 368 Ill. 142.) But as to the circumstances attending the transaction in question, the time of the execution of the several instruments, the details respecting the understanding reached, said Kendell and Mackenzie are the only witnesses and differ in their testimony respecting every essential point.

The master's report of the evidence, exclusive of numerous documentary exhibits of deeds, notes, checks, receipts, etc., covers over 300 pages of legal cap which we have read with great care.

A discussion of the various details relied on to reverse or support the decree would extend this opinion to unwarranted length. We feel that it is enough to say that while we recognize the rule relied upon by appellant in determining whether an absolute deed is a conditional sale or a mortgage, yet we also recognize that to warrant the court in declaring such a deed absolute in form, like the one at bar, to be a mortgage the evidence must be clear, definite, unequivocal, convincing and satisfactory, (Kobnett v. Miller, 303 Ill. 515) and that the burden of proof is upon the party claiming the transaction to be a mortgage. (Casper National Bank v. Jenner, 368 Ill. 143-146.) Upon a review of the evidence we do not think it is of such a character as justifies holding that the deed in question was taken as a mere

security in lieu of the two mortgages released, one of which covered another piece of property. It appears that a mortgage on the latter piece was then under foreclosure and that complainant wished to replace it with another mortgage and sought the release of the second mortgage aforesaid, which covered both that property and the property in question, and that complainant needed money to carry out the transaction for which she applied to Mackenzie, as aforesaid. Kendall does not deny that he gave a receipt for such money, and to harmonize his denial of receiving "cash" takes the position that he protested against the use of that term in the receipt. To obviate the effect of the "option" contract he also testified that he protested against the use of the term "option" although he had previously made a similar contract with Mackenzie for an option under similar circumstances and had exercised it. He was familiar with the use of such terms and the forms of writing pertaining to such transactions and the usual constructions placed upon them. There is nothing in the record to indicate that he was under any compulsion or that there was any attempt on the part of defendant Mackenzie to exercise inequitably such power as he might have over complainant as her creditor. On the whole the documents in evidence accord more with defendant's than with Kendall's version of the facts. As to some details there is testimony which strongly corroborates the former, and we think the master's conclusions that the deed in question was delivered as an absolute conveyance and not as a mortgage was fully justified by the evidence, and that the chancellor rightly dismissed the bill for want of equity. To state more fully our reasons for this conclusion would require a tedious and unnecessary narration of evidence and extended discussion of its probative value. We deem it unnecessary. The decree is affirmed.

Gridley, P. J., and Fitch, J., concur. AFFIRMED.

168 - 38444

WILHELMINA KEEBLER, Appellant,

vs.

JOSEPH M. WEINSTEIN, Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment entered upon a directed verdict for the defendant in a fourth class action wherein plaintiff sought to recover under a lease $620 as liquidated damages for a holding over after its expiration; also $30 as cost of removing ashes and garbage, and $200 as necessary attorneys' fees and expenses in instituting suit for forcible detainer and prosecuting the suit in question.

The lease called for a rental of $150 per month and contained a provision that in case of failure to yield up possession at the termination of the lease the lessee would "pay as liquidated damages for the whole time such possession is withheld the sum of Twenty Dollars per day." Defendant held over 28 days and in his affidavit of merits claimed such provision should be construed as a penalty and that $5 per day was a reasonable rental of the premises, and offered to pay the same, and denied liability on the other alleged grounds.

Plaintiff introduced the lease and the record of the forcible detainer suit, and testimony of two attorneys as to the reasonable value of attorneys' fees in a case where a forcible detainer suit was started and after several continuances was disposed of by agreement, and where two judgments for rent were taken by confession. While there was proof of the detainer

suit there was no proof of the record of the two suits for rent, or of what services were rendered by attorneys in any of the suits, though they were assumed in a hypothetical question put as to their value. In that incomplete state of the proof and because the services alleged to have been rendered in the forcible detainer suit were not separated from what was included in the question, the court, on defendant's motion, properly struck out the testimony thereon.

Nor was any proof offered as to the reasonable rental value of the premises during the period of detention, or of any other item of damage sustained thereby, all of which was capable of ascertainment. Upon the principle stated in Advance Amusement Co. v. Franke, 268 Ill. 579, the court considered the provision for liquidated damages a penalty and properly withdrew that subject from the consideration of the jury. (See also Giesecke v. Cullerton, 280 Ill. 510, and Weiss v. Fidelity and Guaranty Co., 300 Ill. 11.)

The claim for damages for removal of ashes and boxes was predicated on a clause of the lease providing for keeping the premises in repair and in a clean and healthy condition according to the city ordinances. The court held the provision did not require removal of ashes and boxes and struck out the evidence of the cost of such removal. We find nothing in the clause - especially in the absence of proof of any city ordinance - on which to predicate a claim for the expense of such removal.

As, therefore, in this state of the record, plaintiff adduced no competent proof of any of the alleged items of damages the verdict was properly directed.

Plaintiff says it is absurd that a judgment for costs should be entered against him when defendant admitted holding over for 28 days without payment of rent. His suit, however, was

not for such rent but for damages on the theory that they were liquidated. If he had adduced proof of actual damages after the court ruled against his theory of the case the result might have been different. But the court could consider the case only as made by the evidence. The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

181 - 28457

GEORGE G. WILLIAMS et al.,
Appellees,

vs.

A. C. GRANT et al.,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

221 I.A. 200

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment entered upon a verdict of the jury in favor of appellees in an action ex contractu. Appellants state in their brief that they rest their case on the contention that the statement of claim does not state a cause of action, and that the court erred in not striking the same on their motion.

In substance the statement alleges:

That on or about August 20, 1918, plaintiffs were induced by defendants Grant and Mussin to endorse and deliver two certain notes payable to their order, aggregating and worth $6,250, to said defendants and the Grant Wire Wheel Manufacturing Company, a corporation, for "possible investment of the proceeds thereof in said corporation, and upon an agreement that if said investment was not satisfactory, the proceeds of said notes would be returned to them on thirty days' notice after January 1, 1919;" that plaintiffs were not "satisfied with said investment" and requested defendants and said company to return the notes or proceeds thereof, and after some negotiations between plaintiffs, defendants and said company entered into a written agreement with defendants on May 14, 1919, which is set forth verbatim and was signed by defendants and accepted by plaintiffs.

The agreement, as pleaded, recites that said company was indebted to plaintiffs in the sum of $6,250, and at that

date agreed to issue to them 625 shares of its paid up preferred stock, together with $250 in cash, and that they were willing to settle said account if defendants guaranteed to purchase from them said stock at its par value of $6,250 on or before May 10, 1922, and that upon consideration of one dollar and other valuable considerations, the receipt of which is acknowledged, defendants agree, upon presentation of said stock by plaintiffs to them or either of them on or before May 10, 1922, to pay plaintiffs $6,250, provided they agree to deliver to defendants or their assigns at any time prior to said date said stock at $10 per share within ten days of tender of payment therefor, and provided one of said notes therein designated was paid before May 26, 1919.

The statement of claim then alleges that said note was paid May 21, 1919, and the other note at maturity, and that "simultaneously with the execution of said written agreement," the defendants, who were then the officers and promoters of said company, issued to plaintiffs a stock certificate for 625 shares of the preferred capital stock of said company; that plaintiffs have remained the owners thereof since said time and were ready and able at all times between May 14, 1919, and May 10, 1922, to deliver to defendants said stock certificate on payment of $10 per share, which the defendants never offered to pay, and that on May 15, 1922, they tendered said stock, properly endorsed by them, to each of the defendants except Grant and requested payment therefor, in accordance with the provisions of the contract, which defendants refused to make; that grant is no longer a resident of Chicago and plaintiffs do not know his present place of residence or where he may be found.

While a hearing was had on issues of fact, yet as defendants rely wholly on the insufficiency of the statement of claim and have not abstracted or discussed the evidence, we are

not concerned with the facts otherwise than as pleaded.

Defendants urge that the suit is upon a guaranty entered into without a new consideration and subsequent to the original purchase of the stock on August 20, 1918, and, therefore, upon well settled law the agreement is a nudum pactum. There are two answers to this contention: First, that the agreement sued on recites a new consideration and acknowledgment of the receipt thereof; and second, that there was no so-called original purchase of the stock on August 20, 1918, as we read the statement. It alleges in effect that the notes were delivered to defendants Grant and Bussin and the company at that time for "possible investment," but it does not allege that any investment was in fact made until the stock was bought and issued under the new agreement sued on whereby the notes then became the property of the company upon a simultaneous guaranty by defendants to take up the stock at the time and on the terms mentioned, if plaintiffs retained and duly tendered the same, which they allege they did. Not only, too, was there a money consideration recited for such guaranty but defendants were given an option to purchase the stock before the maturity of the contract. From the allegations in the statement of claim, therefore, the contract was supported by a consideration and plaintiffs are alleged to have complied with every condition of the contract required to be performed on their part.

While Grant was not served with process, nor a party to the judgment, he may be made a party thereto by procedure under section 14 of the Practice Act. It is immaterial that no tender or presentation of the stock was made by plaintiffs to him, as the contract provided tender or presentation of the same might be made to any one of the defendants.

It is enough to say with regard to the contention that an agreement by the corporation to repurchase its stock

cannot be enforced that the corporation is not a party either to the agreement sued on or to this suit. The obligation sued on purports to be that of defendants only.

The abstract does not disclose the amount of the judgment nor, as before stated, the evidence on which it rests, and if the statement of claim is defective respecting the damages sustained we think the defects were such as would be cured by verdict. A motion to strike the statement of claim being in the nature of a general demurrer, we think the court did not err in refusing it.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

193 - 28469

BERTRAM J. GRIGSBY et al.,
Appellants,

vs.

ERNEST G. K. ANDERSON,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 639

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellants to recover $1,100 from appellee, claiming that they had paid him that amount as an anticipated profit under a contract for the purchase of 270 shares of stock, to which they were parties of the first part, on an understanding subsequently had, and breached by him, that he was to assist in a particular way in financing the deal.

The contract is made a part of the statement of claim. In defendant's affidavit of merits he alleges that he and plaintiffs were partners in the deal, and that upon that state of facts plaintiffs' remedy is in chancery and not at law. We think the relation of partners is so apparent from the contract as well as the evidence that there could be no recovery in this form of action.

But defendant also denied a breach of the contract on his part and claimed he was entitled to the $1100 he received. In view of the fact that they were jointly interested in the contract as partners and no recovery could be had at law we deem it unnecessary to detail the evidence on that issue.

The only point made on this appeal is that the verdict was against the weight of the evidence. It is an elementary rule of practice that before this court will disturb a verdict on that ground the verdict must be manifestly against the weight of the evidence, which we cannot say it appears to be. Reaching that conclusion and no legal principle being involved it

would subserve no useful purpose, our judgment being final in the matter, to reiterate and analyze in confirmation of that conclusion the rather complicated state of facts with which the parties to the case and their attorneys are fully conversant. Suffice it to say that legitimate inferences therefrom furnish a reasonable basis for the verdict.

Nor do we agree with the contention that the verdict was manifestly against the weight of the evidence simply because the two plaintiffs testified one way and the defendant another as to an alleged oral arrangement for financing the contract after it was entered into. The money sued for was voluntarily paid to defendant by plaintiffs in anticipation of a profit under the contract, for which there is a remedy in chancery if wrongfully paid.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

202 - 28478

MODERN WOODMEN OF AMERICA, On appeal of ANNA G. MADARY, Appellant, vs. ELIZA J. ROY, Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY. 231 Ill. App. 63

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a final decree on a bill of interpleader brought by the Modern Woodmen of America, making parties thereto appellant Anna G. Madary and appellee Eliza J. Roy, daughter and widow, respectively, of Alexander H. Roy, holder in his life time of a $2,000 benefit insurance certificate which was issued by complainant, and is the subject of controversy.

Pursuant to an interlocutory decree entered upon stipulation of the parties complainant deposited the amount of the certificate less the filing fee of $10 with the clerk of the court, and defendants have interpleaded, each setting up her claim to the fund in question. After a hearing in open court a decree was entered allowing appellant what she had expended in payment of dues and premiums, also certain unquestioned expenses amounting to $380, and directed the clerk to pay the same out of said fund, and also an agreed sum of $340 due the undertaker, and on delivery within 30 days of a deed to a cemetery lot by appellant to appellee the further sum of $125 which she had paid therefor.

It appears that the certificate was carried in appellee's name for several years; that in 1918 appellant was made the beneficiary thereof upon a verbal understanding that she was to keep up the payment of dues and assessments because of the inability of the father to do so, and that on March 15, 1922,

just prior to the death of the assured a new certificate was issued making appellee again the beneficiary.

The pleadings raised as one of the issues the mental competency of the assured when he applied for the last change in the certificate, and the court declined to hear testimony thereon offered by appellant. But as the case was disposed of on the facts as they existed prior to the issuance of the final certificate we need not discuss that phase of the case. On the facts as thus disclosed we think the decree should be affirmed.

As appellant's answer stood until all the testimony had been heard she claimed the entire fund in her own right. Appellee contended in her answer that appellant's interest rested upon an agreement made between her and her father to the effect that appellant was to be reimbursed merely for the amount of dues and assessments paid by her. Some months later and after the testimony had been heard appellant filed an amendment to her answer changing her theory. In it she claimed to be entitled to the fund as trustee for her mother during her life, also to be reimbursed for all her court costs, solicitors' fees, court reporters' fees and other expenses incurred with reference to the suit, and that she would be entitled to all the proceeds that she would hold as such trustee at the death of her mother. We find nothing, however, in the facts pleaded by her, or in the evidence, that would support the claim that she held the fund either in her own right or as such trustee.

The real question of fact was, what were the terms of the oral agreement upon which appellant was made beneficiary and what was the legal effect thereof? Appellant testified that her father said he wanted her to get the money she "had in it out," and take the balance and put it in the bank for the care of her mother because she was not capable of handling money. When she

was pressed to state all she could remember that was said, she testified: "All bills were to be paid after I had my money taken out, and the balance of the money put in the bank for the care of my mother." The court then asked: "Is that the substance of what your father said, or did he designate any bills in particular that he desired paid?" She answered: "The doctor's bills and the undertaker's bill." Appellant's husband testified that appellant said she would take over the insurance on one condition, that "in case anything happened to him, that she would take out what she had paid in, and the expenses of the funeral, and put the rest in the bank for the care of the widow." Her sister, who was also present when the agreement was made to transfer the insurance, testified substantially the same saying that appellant "should take the insurance and she was to take out what was coming to her, and pay the expenses, and the balance to go in the bank for her mother."

There was also testimony to the effect that appellant had told various parties that she had agreed to take out of the proceeds of the insurance transferred to her, merely what she had paid out and pay over the balance to the widow.

No one except appellant testified that at the time of the agreement the assured said anything about appellee not being able to take care of herself. The agreement rested in parol, and it is hardly probable that any of the witnesses were able to testify six years after it was made to the precise language employed by the assured. In this connection the language of the Supreme Court in St. Louis National Stock Yards v. Wiggins Ferry Co., 102 Ill. 517, is appropriate:

> "The agreement being verbal, and no one pretending to give the language or the exact terms used by the parties, its real character, and the purport of the terms finally agreed upon, together with its legal effect, presented a mixed question of law and fact, which was necessarily determined by the trial court from all the evidence before it."

The finding by the chancellor in the case at bar was that there was no trust, and upon review of the record we find no good reason for disturbing that finding. Not only do we think that the oral agreement as testified to by appellant was insufficient to create such a trust as she claimed in her amended pleading, but when we take into consideration that the amendment changed the theory of her claim to one inconsistent with that upon which she first relied we may well question her version of the agreement and conclude from the circumstances which impelled the father by reason of his inability to work to make appellant the beneficiary, and from appellant's later admissions above referred to, that the certificate was placed in her name simply to secure her for any advances she made to keep up the insurance. As there was no agreement creating an active trust, and there was no disposition on the part of appellee to question appellant's right to such allowances as were made by thedecree, and as appellant's claim of the right to control the entire fund for her mother without restriction during her life and to retain the balance thereof on her death, is not supported by the evidence and is seemingly unjust and inequitable, we think the chancellor correctly denied her claim to the costs of this litigation. As there was no proof of any bills incurred for medical attention, and the decree reimburses appellant for all funds she has advanced to keep up the insurance and for the funeral expenses, and provides for reimbursement for the amount she paid for the burial lot, we think it allows her all to which she is entitled out of the fund in question.

Accordingly the decree will be affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

211 - 28487

FIDELITY & DEPOSIT COMPANY OF MARYLAND, a corporation,
Appellant,

vs.

JAMES STENSON,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 IL App 211

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment rendered upon a verdict for defendant (appellee) in an action brought by plaintiff company (appellant) on an indemnity agreement contained in the application by defendant to plaintiff for a drain layer's bond.

The bond was executed by defendant as principal and plaintiff as surety to indemnify, save and keep harmless the City of Chicago from any and all loss, costs, damages, expenses or liability of any kind whatsoever, which it might suffer or which might "accrue against, be charged to, or recovered from it by reason of any act or thing done by said drain layer or by any negligence in the execution or completion of any work done by said drain layer or by or on account of any improper work done under and by virtue of the authority of the license issued to him."

In defendant's application for the bond in question he covenanted and agreed "to pay said company any and all loss, costs, charges, suits, damages, counsel fees and expenses of whatever kind or nature, which said company shall, or may, for any cause, at any time, sustain or incur or be put to for or by reason or in consequence of said company having entered into or executed said bond."

While defendant was constructing a sewer for the City of Chicago along one of its city streets one Sallie Sherman

drove an automobile at night into a barricade placed by defendant around an excavation for the sewer. She brought an action for resulting injuries against the City of Chicago and defendant in which a verdict and judgment for $1000 were rendered against the former, but no verdict whatever was rendered as to the latter. The judgment was settled by appellant paying Sallie Sherman $1000. This suit was brought to recover the amount so paid, together with interest and attorneys' fees expended in connection with the settlement.

In support of its case plaintiff introduced in evidence said bond, the application therefor, the pleadings in said action of Sherman v. The City and Stenson, the judgment entered therein, proof of the settlement as aforesaid, and that defendant was in charge of the work when the accident occurred, and rested its case. Plaintiff also offered instructions given in the Sherman case, which the court refused to receive.

Defendant in his affidavit of merits alleged that he had fully complied with the terms of the bond and observed the city ordinances and rules of the department of the city governing drain laying; that plaintiff was not compelled to expend money in payment of any judgment by reason of his negligence; that he was exonerated from liability in said suit, and that if plaintiff paid any money it was paid voluntarily, and introduced evidence tending to show that the accident was not caused by any negligence on his part.

Contending that it was error to direct a verdict for defendant, and that the verdict should have been directed for plaintiff company it urges (1) that the City of Chicago became liable as a result of "an act or thing done" by defendant and that it is not essential that the conduct of defendant should have been negligent or improper; (2) that the trial court erred in refusing to admit in evidence the given instructions in the

case of Sherman v. City of Chicago, and (3) that so far as the place of the accident was concerned there is no question about the liability of the city for defendant's act in constructing the sewer.

There is nothing in the record to indicate that the last contention is seriously questioned, and defendant has filed no brief. The accident occurred at an intersection of a city street with one under the jurisdiction of the Lincoln Park Board. But under the rulings of the Supreme Court there was no exclusive jurisdiction over that portion of the street in said Board, but the jurisdiction was concurrent. (Chicago City Railway Co. v. South Park Commissioners, 257 Ill. 602; West Chicago Park Commissioners v. City of Chicago, 170 Ill. 618; South Park Commissioners v. Chicago City Ry. Co., 286 Ill. 504.) The third point, therefore, need not be discussed.

Interpreting the phrase "by reason of any act or thing done" to include any act of defendant in connection with his construction work regardless of whether it was negligent, and contending that the Sherman suit was predicated upon an act of defendant, plaintiff argues therefrom that under the terms of the bond plaintiff became liable to pay the judgment rendered therein, and if so then under the terms of defendant's application he became liable to pay plaintiff the expenses it incurred, they being, as provided in the application, "by reason of or in consequence of said company having entered into or executed said bond."

Assuming the construction put upon said phrase to be correct yet to render defendant liable in the Sherman suit "the act or thing done" by defendant must necessarily have been the proximate cause of the injury claimed in the

suit, and therefore one of negligence, as such suit was predicated upon the charge of negligence.

In order, therefore, to show in this case a liability under the bond it was incumbent upon plaintiff to prove that defendant's act constituted the negligence on which the judgment in that suit was based. This record, however, fails to disclose that the verdict and judgment in that suit rested upon any negligent act of Stenson. While plaintiff offered in evidence the pleading, judgment and given instructions in the Sherman suit it failed to offer the evidence taken therein, without which it is impossible to know the theory upon which the jury's verdict was rendered, or whether the proof disclosed any negligent act on the part of defendant Stenson.

The first count of the declaration in that suit is predicated upon the negligence of the city alone, and in the absence of any proof of the evidence introduced in that case, and for aught disclosed in this record, the verdict may have rested on that count alone.

Plaintiff made no direct proof of defendant's connection with the accident other than to show that at the time thereof he was engaged in putting in a sewer at the place where it happened and was in charge of the work. Not only was this insufficient of itself, or when taken in connection with the record in the Sherman suit so far as introduced in evidence, to show negligence on the part of Stenson or that any act of his was the proximate cause of the injury sued for, but there was uncontradicted testimony on the part of defendant tending to show that Stenson was not guilty of negligence or any act that was the proximate cause of the accident.

As there was no verdict against defendant in that suit and the evidence upon which the verdict against the city was rendered was not introduced in evidence in this case we think the record fails to support plaintiff's contention that the judgment against the city was "by reason of any act or thing done" by defendant. This record merely shows that defendant erected a barricade into which Sherman's automobile ran, without any additional proof to support the conclusion that he was guilty of any act that was either negligent or the proximate cause of said injury. In the absence of such a showing, therefore, it cannot be said from the record that plaintiff was obligated as surety to pay the judgment in the Sherman suit, or that its apparently voluntary settlement thereof was a loss or expense incurred by reason of its having entered into said bond.

Appellant urges that in order to explain the lack of a verdict as to Stenson the court should not have refused to receive in evidence the instructions given in the Sherman case, as in each mandatory instruction the jury was told that if they found certain facts it should find the City of Chicago guilty, without mentioning Stenson. We fail to see the relevancy of such instructions without proof of the evidence to which they were supposed to be applicable. Plaintiff in this connection cites the case of New York Central Railroad Co. v. Barnet, 183 N. Y. Supp. 95, where the cause of action and facts were somewhat similar, and the instructions given in a personal injury suit were received in evidence. But it will also be noted that the plaintiff in that case introduced in evidence not only the charge of the court to the jury but the material testimony in the personal injury suit, and that the opinion in that case rests largely upon what was disclosed by such testimony.

In this view of the case we think the judgment must be affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

217 - 28493

SARAH KOHN,
Appellant,

vs.

JOSEPH BAYER et al.,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

231 I. A. 337

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant filed her bill to redeem from a mortgage loan of $10,000 made to her by appellee, and asked for an accounting, alleging that $1,000 thereof was usury, and offering to pay the balance due with interest at five per cent per annum.

Appellee and Foreman Brothers Banking Company, the trustee named in the trust deed given to secure the loan, were made defendants to the bill and filed their joint and several answer thereto in which they admitted usury to the extent of $800 and offered to accept the amount justly due, claiming cash expenses of $16, and attorneys' fees incurred by the trustee in collecting rents from the property, which the answer offered to credit on the indebtedness. Later defendants filed their cross bill to foreclose on the basis of these facts, claiming interest at five per cent on the principal due, $318 as a solicitor's fee and expenses, and also asking for an accounting.

In answer to the cross bill complainant took issue on the amount of the indebtedness claiming usury to the extent alleged in the bill, and also took issue on the necessity of a cross bill and solicitors' fees incurred thereby and of said expenses, and alleged that while by reason of said usurious contract cross complainants were not entitled to any interest,

yet cross defendant was willing and offered to pay the lawful rate of interest upon the sums of money owing by her. The answer also pleaded a tender of the principal due on the basis of an indebtedness of $9,000 and interest at 5%.

The cause was referred to a master for conclusions of law and fact, and the decree approves of his report, dismisses the complaint for want of equity, gives the relief asked for under the cross bill and finds as due practically the amount claimed thereunder together with $310.75 as solicitors' fees.

We might dispose of this appeal by saying that while appellant's abstract shows that objections to the report were made and overruled and stood as exceptions, yet what the objections or exceptions were, or whether they presented the points argued here does not appear from the abstract. It is a familiar rule that points not raised in the court below cannot be raised on appeal, and that we will not go to the record in search of grounds for reversal.

But a review of the evidence abstracted, which we need not set forth, justifies the master's finding that the $200 in question, the difference between what complainant claimed and defendant conceded was usury, was not usury nor retained by appellee, but that pursuant to an understanding binding on appellant that sum was paid as a commission to third parties through whose agency the loan was procured at the instance of appellant or her authorized agent. It is enough to say with respect to appellant's authorities cited on the question of usury that they are not applicable to the facts in this case.

As to the allowance of solicitors' fees and expenses we think it was justified by the provision in the deed of trust which provided that complainant should pay "all costs and charges, including attorneys' fees expended or incurred by said

trustee or any beneficiary hereunder in any suit brought to enforce any covenant herein contained or in procuring or defending any suit or proceeding in which either of them may be plaintiff or defendant by reason of their interest arising under this deed, all of which expenditures shall become a part of the indebtedness secured hereby." The trust deed authorized the suits brought by the trustee to recover rent from the mortgaged premises and solicitors' fees in the present proceeding, the reasonableness of which is not questioned. An allowance therefor would, therefore, be made under proper accounting whether had as asked for in the bill of complaint or upon the cross bill.

It may be conceded, however, that the cross bill was unnecessary. The complainant offered in her bill to pay all that would be justly due, and a decree therefor under the bill would operate as a foreclosure if it were not paid within the time alloted by the court. (Decker v. Patton, 20 Ill. App. 210, 216.) But this point was not raised by demurrer to the cross bill or on motion to dismiss the same, as should have been done. On the contrary, complainant took issue thereon, and the cross bill being germane to the original bill it cannot be said that it was error to enter a decree thereon. (Ackley v. Croucher, 203 Ill. 530, 634.)

But while we recognize an inconsistency in dismissing the bill of complaint for want of equity, which was practically conceded in the answer thereto with respect to the claim of usury, and do not think the claim to equitable relief thereunder was waived by taking issue on the cross bill, yet the practical result was the same whether the decree was based on the bill or the cross bill and record. Hence, to reverse on this technical error would, contrary to the rule in equity, be an observance of form rather than substance. It is true that complainant

could not obtain relief on the usurious contract without offering, as she did, to do equity by paying the lawful rate of interest, and that interest could not have been recovered on such a contract under an original bill, by defendant claiming the same. Nor could it be recovered on the cross bill had not complainant in her answer to the cross bill expressed her willingness and made an offer to pay such interest, thus removing that question as an issue in the case.

Accordingly the decree will be affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

RAYMOND HELLER,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY et al.,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

231 I.A. 231

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for $1,250 for damages sustained from personal injuries alleged to have been received by plaintiff in an attempt to board one of defendants' cars.

The gist of the declaration is that plaintiff fell to the pavement as a result of defendants' negligently starting the car with a jerk "from a standstill" while he was in the act of boarding it.

Appellants urge that the verdict was against the weight of the evidence and that there was error in giving certain instructions at plaintiff's request.

The car was going east on Twenty-second street, Chicago, and had stopped for passengers at or near the west curb line of the crossing at Lawndale avenue. At that point, or just after the car started, a fuse was blown and the motorman got under the car to replace it. Plaintiff and his two witnesses state that the car at the time the motorman was so engaged - which was apparently only a short time - stood with its front near the west line of said crossing. The substance of the testimony of most of defendants' witnesses is that its rear end was near the middle of the crossing. The car stopped in both places, and the difficulty in determining the facts as to the accident arises from differing versions as to whether the

car stopped with its rear end in the middle of the crossing before or after the accident.

Just before, or about the time plaintiff fell, another car came from the west on the same tracks up to or near the crossing and also stopped. Plaintiff came from the south on the west side of Lawndale avenue to board an east bound car at that crossing. The theory of his case was that the car in question was then standing with its front end near the west line of said crossing; that before he reached the south curb of Twenty-second street the motorman was under the car; that as he reached the car and placed his right foot on the step to its rear platform the car started with a jerk, throwing him to his knees on the pavement; that the car went a few feet and stopped and about that time the other car came up to the crossing.

It was defendants' theory that the second stop was occasioned by the blowing of the fuse; that the motorman was engaged in fixing it when the other car arrived; that plaintiff was walking from the south curb towards the rear car when his knees gave away, or he slipped and fell to the pavement, at a point about five feet in front of the rear car and the same distance south of its track, and that the car in question was then standing still about twenty to twenty-five feet in front of the other.

It may be said that not all the testimony on either side is in perfect harmony with the theory of that side. The jury, however, had to choose between the two theories, and by eliminating certain inconsistencies, due either to faulty memories or indistinct impressions of the related facts, they might readily adopt plaintiff's as the most natural and credible. Aside from defendants' servants on each car, the witnesses on both sides appear to be disinterested, and while more testified for defendants than for plaintiff we do not think there was a preponderance of evidence in defendants' favor on the salient facts in the case. It is

not unusual that when the attention of several persons in different positions is suddenly attracted to an unexpected event their accounts of it vary, especially as to incidental details. What is particularly noticed by one escapes the attention, or receives nothing more than a passing glance, of another. And, too, the attempt at a later time to fill in the picture with details often discloses that the impressions are too indistinct and the recollections too obscure to possess much probative value.

In reading the evidence produced in this case we are impressed that much of it is uncertain and might well have been deemed by the jury as more or less unreliable.

No witnesses were in a better position to note the salient facts than plaintiff's, one a young woman standing at the curb on the southwest corner of the intersection, and the other a young boy who sold newspapers at that corner. Both gave graphic and natural accounts of the attempt of plaintiff to board the first car while it was at the first stop at the west line of the crossing before the other car had arrived. Each saw him place his right foot on the step to the rear platform and in the act of raising the other when the car started with a jerk and threw him to the pavement on his knees. Their testimony corroborated plaintiff's version in essential particulars. If this theory of the accident is correct then their varying recollections as to minor details are of little consequence. The record discloses no motive to fabricate their testimony. In fact their and plaintiff's version of the accident seems more probable than defendants.

But appellants lay much stress on the number of witnesses supporting their theory, viz., five passengers, two on the rear platform of the first car and three on the front platform of the other car, and the two conductors and two motormen. We shall not undertake to give their testimony in detail. The jury may well have rejected portions of it as of little value on the theory

that it shows more or less confusion whether the first car started up before the accident. If, as there was testimony to show, it suddenly stopped again after going only about three to six feet, its movement in the short interval may easily have escaped notice of those whose attention was suddenly directed to the falling man, and they may have received the impression owing to its quick stop and their seeing the car standing that it had not moved after the arrival of the second car and before plaintiff fell. If we eliminate for uncertainty their testimony on that phase of the case most of the rest of it is not inconsistent with plaintiff's theory of the accident. For if just as the second car came up, the motorman of the front car had adjusted the fuse and quickly boarded and started the car and almost immediately stopped it again on a signal bell from the conductor as plaintiff fell to the street, as there was testimony tending to show, the jury may have concluded that the attention of defendants' witnesses - except said conductor - being suddenly drawn to plaintiff's falling they did not observe the direct cause of it and got the impression that the car in front had not moved at all.

And there was some evidence of defendants' witnesses to support this theory. The conductor of the rear car said that when he saw plaintiff on his hands and knees about five feet to the front and south of his car the front car was about fifteen or twenty feet ahead moving slowly and it came to a stop. The conductor of the car in question did not see plaintiff fall but agreed with plaintiff's witnesses that his car was at the crossing when the fuse was put in but disagreed with all other witnesses in claiming that it stopped only once. The motorman of his car while he claimed the fuse was fixed at the time of the second stop, testified: 'I was starting to go, and he (conductor) was holding me with the bell. * * When he gave the second bell to stop I just opened the door to see what happened," and said he then saw plaintiff at the curb stone being held by the crew of the other car, who went to him

after he fell and had been helped to the curb. If he was mistaken as to whether his car started his testimony otherwise conforms to that of one of plaintiff's witnesses who said that it had started but received the two bell signals and stopped immediately after plaintiff fell from the step. The motorman of the rear car said he saw plaintiff falling, that he had not reached either car, that both cars were standing still, and that he saw his conductor help plaintiff to the curb. It is somewhat significant that while he was the only one of either crew to see plaintiff's fall and claimed it was in an apparent effort to reach his car and attributed it to his slipping or his knees giving way, that the conductor of the other car was the one active in procuring names of witnesses. Of the two passengers on the rear platform of the front car one knew nothing about the accident until he saw plaintiff lying at the curb and could not tell whether the car made more than one stop, and the other testified that he didn't pay much attention to what happened there but gave as his version that after the car picked up passengers at its first stop and started up the fuse blew or trolley came off the pole, that the car started again, that he saw plaintiff coming towards it, and fall about six feet behind it, because, as he said, "the car started moving, and naturally he fell, he couldn't keep going with the car." The three witnesses who stood on the front platform of the other car said plaintiff was coming towards their car apparently to board it and "his knees gave way" when he was a few feet to the front of it. While none of them said both cars were then standing still, one testified contrary to all others that the second car had started up and stopped as soon as plaintiff fell, but did not remember about the other car.

Taking all the testimony together and the contradictions and discrepancies in the testimony offered by defend-

ants and parts consistent with plaintiff's theory of the case, we cannot concur in appellants' contention that the verdict was manifestly against the weight of the evidence but think the jury had ample grounds for believing therefrom that plaintiff's theory was the correct one in its essential details.

Nor do we think there was reversible error in giving either of the two instructions complained of. One recited hypotheses which would render plaintiff a passenger, among them if "he was attempting to get on such car in the usual and customary manner." It is urged that this phrase might mislead the jury to have regarded him as a passenger if according to defendants' theory he was approaching the car but had not reached it. We do not think the phrase is capable of such a strained construction.

The other instruction stated, in form that has been many times approved, the duty of a carrier to its passengers, and it is claimed that it thereby assumed plaintiff was a passenger. While its abstract form may be objectionable such relation was plainly one of the issues and there was ample evidence to which the theory of the law stated in the instruction was applicable. As the jury unquestionably adopted plaintiff's theory of the facts under which he in law became a passenger, we do not think when considered with other instructions presenting that issue before them that the jury were misled by the mere form of the instruction.

The judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

235 - 28511

NICK KESSERLING,
Appellant,

vs.

LOUIS B. LARSEN,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I. A. 2

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit in tort to recover damages as the result of a collision between plaintiff's automobile and defendant's, which they were respectively driving at about 1:30 o'clock in the morning, plaintiff from the north on Racine avenue, Chicago, and defendant from the east on Wrightwood avenue, a street intersecting the former at right angles. There were no witnesses to the collision except the parties themselves, each of whom testified, and plaintiff's wife whom the court properly did not permit to testify.

Plaintiff claimed the collision was at the southwest corner of the intersection, and defendant that it was at the northwest corner, and each claimed that the other's car ran into his. Each was driving in excess of the speed contemplated by the statute for residential sections of the city under such circumstances. Plaintiff admitted he was driving at the rate of 15 miles per hour, and defendant that he was driving from 12 to 16 miles per hour. Neither saw the other approaching until immediately before the compact, too late for either to prevent it. The collision threw defendant's car to the southwest corner over upon its right side on the sidewalk, and the bumper thereof a distance of 30 feet beyond the corner, and plaintiff's car ran across the curb 100 feet southwest into a lot.

RICK CHRISTIE,

Plaintiff,

vs.

TROY P. PARKER, Physician,

Defendant.

Re: Justice Number Eighteen and Division of Jan Doles

Ship is a unit in text to measure changes in the
remedy of a modified process plaintiff's memorandum
pulmonary," which they were respectively private at about
1:30 a.m. in the morning. Plaintiff from the north as
Jaycee Avenue. Christie and Clement from the west on
Highwood Avenue, a street intersecting the former at right
angles. There were no witnesses to the collision except the
parties themselves, each of whom testified, and plaintiff's
wife whom the court properly did not permit to testify.

Plaintiff claimed the collision was at the north-
west corner of the intersection, and declared that it was a
bright summer morning, and declared that the court's own
motion in dismissing me for contributory negligence on the
part of the plaintiff. Each was driving in excess of the speed
limit. The evidence discloses that the court's own
motion was improper. Plaintiff objected to the ruling
of the trial judge at the time. Motion was then made
for a new trial. Motion was overruled, and defendant
appeals from the order. Plaintiff complained in his
petition that he was driving his automobile in a north
direction on Jaycee Avenue at a speed not in excess of 30
miles per hour, and that the defendant was driving his
automobile in a westerly direction on Highwood Avenue at a
speed of 40 miles per hour, and that the defendant
failed to observe the stop sign on the

The case was tried without a jury. The court's finding for defendant was justified on the theory that the proof failed to show ordinary care on the part of plaintiff. The lamps on both cars were lighted and the evidence tends to show that with the exercise of ordinary care, such as should be exercised at such a time and place, each should have seen the other in time to avoid the accident.

Appellant urges that he was entitled to the right of way, but that fact did not exempt him from exercising due care on his part to avoid running into the other party.

Appellant complains that a photograph of the condition of his car made two days after the accident, when he testified it was in the same condition as immediately after the accident, was improperly rejected. While its rejection may have been justified by failure to show by the photographer who took it that it was a correct photograph, yet if admissible it would not change the circumstances testified to by both parties which indicate negligence on the part of each that would preclude recovery of damages by either of the other.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

19232.
62 - 28332

AUGUSTUS G. ROY, executor of the estate of Mark Roy, deceased,
Appellant,

vs.

SAMUEL C. CLAGGETT,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.
231 I.A. 302

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court perpetually staying the issuance of any execution against appellee upon a judgment obtained by Mark Roy, now deceased, in his lifetime.

The judgment in question was a judgment by confession for $4,502.88, entered May 10, 1917, against appellee and Anna Claggett. An execution was at once issued thereon, which was returned nulla bona on August 9, 1917. On July 16, 1917, appellee filed his petition in bankruptcy in the United States court for the Northern District of Illinois, and on February 11, 1918, by the order of that court he was discharged from his provable debts. On October 11, 1922, appellee served a notice upon William Annan Taylor, the attorney of record for the plaintiff in said judgment, stating that on October 13, 1922, he would present to the Circuit Court a petition, a copy of which was attached to the notice, setting up his discharge in bankruptcy as above stated, and that he would move the court for an order perpetually staying further executions against appellee on said judgment. On the date mentioned in the notice counsel for appellee and Mr. Taylor appeared in court, and Mr. Taylor then said to the court that Mark Roy was dead, and objected to any hearing on the motion or petition of appellee until the legal representative and heir of the deceased

could be brought in. The motion was thereupon postponed to October 21, 1922, and on that day again postponed to October 28, 1922. During this interval, on October 19, Mr. Taylor served a notice on appellee's counsel stating that he "has objected, and will object," to any hearing on said petition, and will present an affidavit, attached to his said notice, "as an answer to said petition and as a statement of my objections to any proceedings or order on said petition or in said cause." The affidavit so attached states in substance that Mr. Taylor was the attorney of record for the plaintiff at the time of the entry of the judgment, but that said plaintiff died March 10, 1922, leaving a last will and testament in which he named his brother Augustus G. Roy executor of his estate, and named his son Elmer J. Roy sole beneficiary; that said Augustus Roy lives in Chicago, and said son in Lexington, Illinois; that such facts were well known to appellee, who is the brother of the deceased wife of Mark Roy and the uncle of Elmer J. Roy; that he (affiant) "has no knowledge of said alleged bankruptcy proceedings" and that if any claim had been filed by Mark Roy in said proceedings he, the affiant, "verily believes he would have known of it;" that since the entry of said judgment appellee has made certain payments thereon aggregating $2,643.50, the last of which was paid April 26, 1921; that said Augustus Roy and Elmer Roy filed a creditors' bill against appellee and others, returnable to the November, 1922, term of the Circuit Court; that he objects to any proceedings or order on said petition because no proper notice has been given to "the parties in interest," because the court has lost jurisdiction of the original cause, because there is another suit pending in which appellee's rights may be determined, and because the alleged bankruptcy proceedings are no bar to the collection of the judgment, for the reason that the payments made on said judgment since his alleged dis-

charge in bankruptcy have revived the same. On receiving such notice, appellee's counsel on October 18, 1922, sent a new notice to Mr. Tayler and to appellant, the executor, by mail to their respective addresses in Chicago, stating that the hearing on said motion and petition had been set for October 21, 1922, in Chicago. On October 23, 1922, the matter came on for hearing before the Circuit Court, and the record shows that Mr. Tayler appeared and stated he was the attorney for the estate of said deceased; that he had endeavored to collect said judgment on behalf of said estate, and after the first notice was served had ordered an alias execution on said judgment and had it placed in the hands of the sheriff; also, that he had communicated with the executor and had been authorized to resist the petition of appellee, and that the creditors' bill mentioned was filed October 18, 1922. Thereupon, without the hearing of other evidence than the sworn petition and the above-mentioned answer of Mr. Tayler thereto, the Circuit Court entered the order appealed from.

Most of the contentions made by appellant in the Circuit Court, which are repeated in this court, have been held untenable by the Supreme Court of the United States in the case of Boynton v. Ball, 121 U. S. 457, which reversed the judgment of the Supreme Court of Illinois in the same case, reported in 104 Ill. 627. In that case, Ball, in April, 1877, sued Boynton in the Circuit Court of Illinois and obtained a judgment in December, 1879. Pending this suit in the state court, Boynton on his own application was declared a bankrupt in April, 1878, and received his discharge in bankruptcy in December, 1880. In March, 1881, Boynton filed a petition in the state court asking for a perpetual stay of execution on the judgment rendered in favor of Ball. With such petition he filed a certified copy of his discharge in bankruptcy. The motion was denied by the Circuit Court, from which ruling Boynton appealed to the Supreme Court of Illinois,

where the action of the lower court was affirmed. Boynton sued out a writ of error in the Supreme Court of the United States, which held that as the bankrupt's final discharge was not obtained until after judgment had been rendered against him in the state court, he could produce that discharge in the state court and obtain a perpetual stay of execution. So far as the legal right of appellee to have the execution against him perpetually stayed is concerned, we think the present case is not distinguishable in principle from the Boynton case, supra. In so far as there is any difference in the facts, the facts in the present case are more favorable to appellee than were the facts in the Boynton case.

It is urged that there was no proof of appellee's discharge in bankruptcy. That fact was asserted in the sworn petition of appellee and was not denied by appellant. The mere statement in the answer of Mr. Taylor, that he had no knowledge thereof, is not such a denial. Hence, on familiar principles, it was admitted, and was not required to be proved. Moreover, no objection of this kind appears to have been made in the court below and cannot be made for the first time in this court.

Appellant's counsel treat the proceeding in the Circuit Court as a new suit, requiring new pleadings and the service of summons on the representatives of the deceased plaintiff in the judgment. We do not think this view can be sustained. Courts of law have jurisdiction to control their own process, even after the close of the judgment term, and may recall or stay executions at any time on motion properly made and supported by the proof of sufficient facts (Watson et al. v. Reising, 24 Ill. App. 1, 4); and the Boynton case, supra, holds that it is the duty of the state court which has entered a judgment to recognize and enforce a discharge in bankruptcy by a stay of execution whenever the fact of such discharge is brought to the attention of the court by motion. The notice given to appellant in this case was sufficient.

especially, in view of the fact that upon the hearing Mr. Tayler admitted that he represented appellant, had communicated with him after receiving the notice and had been authorized by him to resist the granting of the petition and the entry of the order appealed from.

Appellant's counsel says in his brief that the order appealed from stays the issuance of execution not only against appellant, but also against Emma Claggett, the other defendant in said judgment. We do not so understand the order, which is "that execution be and hereby is perpetually stayed herein, as against said defendant Samuel C. Claggett." While it is true that the same order recalls the alias execution which was obtained by Mr. Tayler after appellee's petition had been filed in the Circuit Court, that part of the order was proper for the reason that such execution was evidently against both defendants.

The contention made by appellant's counsel in the Circuit Court that the payments made by appellee upon the judgment subsequent to the discharge in bankruptcy revive the judgment, is not argued in this court. Appellee's counsel, however, cites cases holding that the mere fact that such a payment has been made will not, of itself, unsupported by any evidence of a promise to pay the balance, revive the judgment, and the cases cited support this view. (St. John v. Stephenson, 90 Ill. 82; Wilson v. Chandler, 133 Ill. App. 622.)

For the reasons stated the order of the Circuit Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

81 - 28357

GILBERT C. FERSON,
Appellant,

vs.

AARON ROSENBAUM,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE PITCH DELIVERED THE OPINION OF THE COURT.

Gilbert C. Ferson sued Aaron Rosenbaum in the Municipal Court, claiming $375 for "rent and moneys due under a lease." The defendant denied there was anything due to the plaintiff and claimed that the lease was obtained by fraud and the concealment of material facts. Upon a trial before the court without a jury, the court found the issues for the defendant and entered judgment accordingly, from which this appeal was perfected.

The defendant operated a shooting gallery upon 63rd street, in Chicago, but desiring to change his location, found a shooting gallery for rent on West Madison street, belonging to the plaintiff, and on September 6, 1921, the plaintiff executed and delivered to the defendant a lease of the premises known as 3856 West Madison street, "being the premises now occupied as a shooting gallery," for a term beginning September 15, 1921, and ending September 14, 1923, at a monthly rental of $50, payable monthly in advance. Attached to said lease was what the parties call a "rider." This "rider" recites that "the parties hereto mutually agree that said Ferson is now running a shooting gallery in said premises," and that Rosenbaum agrees to buy all the personal property and equipment therein (except guns and meter) for $600, payable $25 a month on the 15th of each month, beginning September 15, 1921; that

[illegible]

in case Rosenbaum shall fail or refuse to pay any of such monthly payments, then all payments made by him to Person shall be forfeited, and the personal property shall remain the property of Person. Defendant paid the first month's rent of $90 on September 7, 1921, and on September 12, 1921, paid $25 as the first installment on the price of the shooting gallery equipment. On September 9, 1921, he made application to the city collector for a transfer of his license from the premises on 63rd street to the plaintiff's premises on West Madison street. Such application was referred to the police department, who endorsed the application, under date of September 15, 1921, as follows: "The within applicant is of good reputation, but owing to the strenuous objections made by persons in this locality to a place of this kind being operated at this address, on account of the noise from the shots keeping them awake nights long after midnight, I recommend that no license be issued." This endorsement is signed by the captain of police and approved and marked "Not granted" by the superintendent of police. On September 15, 1921, before defendant knew of this action of the police, he moved his personal belongings to the West Madison street premises, but, on attempting to open the place as a shooting gallery, was stopped by the police. He then made inquiries and discovered that long before that time the plaintiff had been refused a license for the same reasons, that he had run the place for a while under some sort of verbal permission from a police captain, and had finally closed it on July 1, 1921. The plaintiff testified that he closed the place because "the weather was extremely hot, and economical conditions were such that I deemed it advisable to cease then." On learning these facts the defendant notified the plaintiff by letter that he considered this a breach of his contract. The plaintiff offered to help get a license through an alderman, but nothing came of this. On September 30, 1921, the defendant moved out and refused

to pay any more rent or anything further on the contract for the purchase of the shooting gallery equipment. The defendant testified that Ferson was present when he moved, and asked for the keys. The plaintiff admitted receiving the keys at that time, but denied that he asked for them, claiming the defendant tendered them to him with the understanding that plaintiff should find another tenant.

The plaintiff contends that the court erred in admitting testimony regarding any alleged surrender of the lease on September 30, 1921, because of the fact that no such defense was set up in defendant's affidavit of merits. This argument is based upon a rule of the Municipal court, which is not in the record and of which we cannot take judicial notice. However, the defendant denied in his affidavit of merits that anything was due for rent as claimed in the plaintiff's statement of claim, and upon the issue thus made it was competent to show that the lease and contract had been cancelled by mutual consent.

On the theory that there was no such cancellation of the lease, appellant's counsel further contend that no such fraud was shown as would avoid the lease and contract because "there was no misrepresentation of past existing facts." We think the evidence proved the contrary. The lease signed by plaintiff expressly states that "Ferson is now running a shooting gallery in said premises," which statement was not true, and was known by plaintiff to be untrue. The evidence shows that relying upon such misrepresentation of fact, Rosenbaum bought the shooting gallery equipment and signed the lease, and was deceived thereby. The mere fact that there was a clause in the rider purporting to give the lessee the right to occupy the premises "as a retail cigar store, or for any other purpose desired by the lessee to which said lessor may give his written consent," does not change the fact that Rosenbaum

understood that what Ferson wanted was a place that could be at once operated as a shooting gallery, and that he bought the equipment on that understanding.

The judgment of the trial court is affirmed.

AFFIRMED.

Gradley, P. J., and Barnes, J., concur.

91 - 28367

THE CARBIC MANUFACTURING COMPANY,
Appellee,

vs.

THE OSGOOD COMPANY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 A. 622

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In December, 1921, the plaintiff had an office at Room 1805, Conway Building, Chicago. Its lease expired May 1, 1922. The defendant is a foreign corporation whose principal office is at Marion, Ohio. It also had an office in the Conway building, which was occupied by one Arthur B. Sonneborn and a stenographer. Upon the door of this office was painted the name of the defendant and the name of Sonneborn. Sonneborn was furnished by defendant with letterheads, at the top of which was engraved the words: "The Osgood Company. Manufacturers of Excavating Machinery. Marion, Ohio, U. S. A." At one side of this heading were the words: "Steam Shovels," under which was a picture of a steam shovel, and on the other side: "Dipper Dredges," beneath which was a picture of such a dredge. Below this heading was printed the following: "Chicago Office, 111 W. Washington St., Arthur B. Sonneborn, District Sales Manager." Sonneborn used cards in his business which were printed as follows: "The Osgood Co., Steam Shovels and Dredges, 111 West Washington St., Chicago, Ill. Arthur B. Sonneborn, District Sales Manager." It is a fair inference from the evidence that Sonneborn was the only representative in Chicago of the defendant company, and that the room or office occupied by him in the Conway building was the only office of the defendant company in Chicago. On December 15, 1921, the plaintiff, desiring to

remove its office from the Conway building to another location, made an arrangement with Bonneborn to sublet its office to the defendant for the remainder of the term of the lease. This arrangement was confirmed by a letter written by Bonneborn upon one of the letterheads above mentioned. The letter reads as follows:

"Carbic Mfg. Co., 1805 Conway Bldg.,
Chicago, Illinois.

Gentlemen:

In accordance with understanding between the office of the building, yourselves and ourselves, we will rent your office at 1805 Conway Building from January 1st, 1922, to May 1st, 1922, at a rental of One Hundred Dollars ($100) per month. It is understood in the event that your lease is cancelled prior to that time by the building, we are to be released from this agreement. Rent is payable in advance to Carbic Mfg. Co., 565 West Washington Blvd.

Yours very truly,

THE OSGOOD COMPANY,
Arthur B. Bonneborn,
Dist. Sales Manager."

All this is typewritten except the signature of Bonneborn. Upon receipt of this letter, plaintiff's representatives closed a pending agreement for another office at 565 West Washington boulevard, by paying $300 to a tenant who was occupying the space it desired, in order to get possession of the same, and began removing its effects from the room in the Conway building. A few days later Bonneborn verbally informed the plaintiff's agent that "his part of the agreement would not be adhered to," whereupon plaintiff's agent told Bonneborn that plaintiff would be out of the Conway building by the end of December, and would expect him to stand by his agreement. On December 27th plaintiff wrote to Bonneborn stating in substance that the agents of the building had advised that they would endeavor to dispose of the space in question to somebody else if he, Bonneborn, would give his

Yours for action from the Young Fighting to restore Ireland,
made an arrangement with one whose to notice its action as the
declaration - for the remainder of the term of the lease. This
accompanies you enclosed is a letter written by Democrats from
one of the letterheads above mentioned. The letter reads as
follows:

Dear Citizen:

In accordance with understanding between the
office of the Irishman, Secretary and Secretaries,
we will meet your office at 2001 Canada Building
from January 1st, 1917. To buy Jan. 1917, at a
period of the Tuesday Delivery (1916) was Canada.
It is understood in the event that your lease is
cancelled under that time by the Delivery, we
are to be relieved from duty agreement. That is
Delivery is entered in Circular 219.. not more
Publication Bldg.

Yours very truly,

Yet this is therefore except the alignment of Canada. Then
[illegible] by [illegible] Bldg to a Company who have the space
[illegible] it occur to [illegible] of the room, not below
[illegible] the [illegible] Bldg. [illegible] the Canada building. I the
Bldg later [illegible] the [illegible]'s space that
[illegible] the [illegible] would not be allowed to[illegible]
the Canada building by the 1st of December, and would remove the
[illegible]'s space that [illegible] [illegible] to [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]

written permission to do so. Sonneborn did not give such permission, but on January 11, 1922, in reply to the plaintiff's letter, referred the plaintiff to his letter of December 15th. Sonneborn did not move into plaintiff's vacated office, nor pay the rent for January, and on January 16, 1922, plaintiff wrote to the president of the defendant company at Marion, Ohio, setting out the foregoing facts, and stating that "the matter is being referred to you because it appears that no satisfaction will be given us by your local office * * * also that you will therefore see fit to back up the agreement your Mr. Sonneborn made." To this letter the president of the defendant company replied, under date of January 25, 1922, acknowledging receipt of the letter "regarding space in the Conway building," and adding: "we shall let you have further reply as soon as we can complete our investigation, which we anticipate will be within the next few days." No further reply was made. The plaintiff paid to the owners of the Conway building the rent for the four months covered by the agreement, and sued to recover that amount. The defendant set up in its affidavit of merits that Sonneborn was not an officer of the defendant company, but a mere employe, who was without authority to enter into any such agreement on behalf of the defendant. Upon a trial before a jury there was a verdict in favor of the plaintiff for $400, and from a judgment entered thereon this appeal was perfected.

It is contended by appellant's counsel that none of the acts of Sonneborn, nor all of them together, show, or tend to show, that defendant entrusted him with authority to negotiate a lease; that for this reason, the two exhibits offered in evidence by the plaintiff, viz., the agreement written upon the letterhead of defendant, and the business card of Sonneborn, were not admissible as against the defendant, and that upon this theory, the trial court should have directed a verdict for the defendant.

Defendant's counsel admit that the proof shows that Sonneborn was an agent of the defendant; but they deny that he had authority to sign a lease on behalf of defendant. The president of the defendant company testified, by deposition, that Sonneborn was its sales agent in Chicago, and that it had furnished him with an office in the Conway building. The evidence also shows that he, as such agent, was in sole charge of that office. When the defendant placed him there, and placed its name on the door with Sonneborn's name below it, and permitted him to use its stationery with his name printed thereon as district sales manager, the defendant must be presumed to have known that persons desiring to transact business with it in Chicago, of a local nature, would deal with him as its representative in Chicago. He was the only agent defendant had in Chicago so far as the evidence shows. Even if he was not a general agent of the defendant, but merely the defendant's sales agent in Chicago, persons dealing with him under the circumstances above stated would naturally assume that he had authority from defendant to rent an office for his use as such agent.

In Faber-Musser Co. v. Dee Clay Co., 291 Ill. 240, it is said (p. 244): "The law is well settled that a principal is bound equally by the authority which he actually gives and by that which by his own acts he appears to give." The following quotation from 21 R. C. L. 907, is there quoted and applied: "Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority." In the same case it was further held that while the declarations

of an alleged agent are of themselves incompetent to prove agency, they are admissible against the principal to show the extent of the authority of one who is, in fact, an agent; and that letterheads used by the agent are admissible on the question of the extent of his authority, where it may be assumed from the record that the letterheads were in general use.

We think the decision in that case is peculiarly applicable to the facts of this case. While it is true that in that case the contract in question was of a character that was within the ordinary duties of a sales agent, yet the case did not turn upon that fact alone. It turned upon a series of facts very similar to those of the present case; particularly the facts that the defendant company in that case maintained an office in Illinois, which was in sole charge of the alleged agent, with defendant's name on the door, and that such agent used the defendant's letterheads, which facts the court says "would fully justify any reasonable man in assuming that the person in charge of that office had full control and management of the business of sales for appellee." So in this case we think the facts here shown would justify any reasonbble person in assuming that the person in charge of the Chicago office of the defendant had full control and management of the business of sales for the defendant, and as an incident thereof, had authority to provide himself with an office in which such business could be conducted.

What we have said disposes of the further contention that the court erred in giving an instruction on the theory of apparent authority.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

100 - 28376

THEODORE WITZ,
Appellee,

vs.

VERA LINEK and LOUISE LINEK,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 202

MR. JUSTICE WITCH DELIVERED THE OPINION OF THE COURT.

Plaintiff is a musician, who, in the early part of 1921, owned a violin. He testified it was a "rare old violin made by Lorenzo Storioni in 1768," for which he paid $725 in 1920. The defendant, Louise Linek, runs a beauty parlor in Chicago, and the defendant, Vera Linek, is a saleswoman in a music shop, and was taking violin lessons. They are sisters and lived together in the rear of the beauty parlor. Vera Linek met the plaintiff while she was buying a violin, and their acquaintance ripened until he became a frequent visitor at the sisters' home. Vera Linek testified that Witz was a man of considerable talent and she became interested in his work. Along in March, 1921, he sought and obtained a loan of $600 from the sisters for the ostensible purpose of enabling him to make a concert tour. He did not, however, go on the tour. He testified that on April 8, 1921, while he was visiting the defendants and after he had played his violin at their request, he was asked by one of them to step across the street and buy some ice cream; that upon his return his violin had disappeared; that he asked the defendants what had become of it, to which Vera Linek replied: "It is a hundred miles away by this time;" that one of them said something to the effect that he had not used the $600 they had loaned him for the purpose he had obtained it; and then gave him the card of a lawyer and told

him to see the lawyer about it; that he protested against their taking the violin, saying that he depended on it for his living; that he called up the lawyer the next day and told him to make out a note or chattel mortgage so that he could get back his violin; that some delay occurred but finally an appointment was made to meet in the lawyer's office two days later, but that before the time fixed for such meeting, Vera Linek told him her house had been burglarized and the violin stolen; that thereupon he caused her to be arrested, but the violin was not returned.

The defendants' version of this incident is to the effect that on April 8, 1921, when plaintiff visited them, Vera Linek told him they had found that he was not using the money they had loaned him for the purpose for which he had borrowed it, and asked him to return it; that he said he didn't have the money, but offered to leave the violin as security, or give a chattel mortgage on it, to which Vera Linek assented and produced the card of a lawyer, handed it to plaintiff, and told him to see the lawyer; that she also told him they intended to visit some friends in another part of the city and asked his permission to take the violin with them, which he gave; that they made such a visit, taking the violin with them; that upon their return they placed it on the piano and went out to a brother's house for the evening; that upon their return they found the house "all upset," the violin and $65 in money gone, and some detectives in charge of their rooms. They denied that while the plaintiff was absent they took or concealed the violin, as claimed by the plaintiff.

The plaintiff brought suit in replevin, which was changed to trover upon the return of the bailiff that he had been unable to find the violin. A jury trial was had, resulting in a verdict in favor of plaintiff for $1,300, and from the

judgment entered upon it the defendants appealed.

Appellants' contentions, stated in seven paragraphs, may be summarized as follows: (1) there is no evidence connecting Louise Linek with the alleged conversion of appellee's violin, or of a demand upon her for the return of the violin and a refusal by her; (2) the verdict is contrary to the preponderance of the evidence, and (3) defendants did not have a fair trial because of improper and prejudicial remarks made by plaintiff's counsel during the trial.

As to the first contention, we have carefully examined the abstract and find a number of facts and circumstances tending to prove that both sisters actively participated in getting possession of the plaintiff's violin. Appellants' counsel argue that the whole conversation which occurred on the evening of April 8, 1921, was between Vera Linek and the plaintiff, and that Louise Linek had nothing to do with the matter. This theory is not borne out by the evidence. It is clear from the evidence, that if defendants took the plaintiff's violin and concealed it in his absence - as he testified - both were concerned in such taking and concealment and in the subsequent refusal to return it to him when he asked for it. Both had loaned him money, and while Vera Linek apparently did most of the talking, her talk was in effect a demand on the plaintiff for the return of the money both had loaned him. Louise Linek testified she wrapped up the violin and took it with her when they went visiting. It is apparent both were acting in concert. Where an actual conversion is shown no demand and refusal are necessary. (Hayes v. Nasa. Life Co., 135 Ill. 626, 637.) There was evidence tending to prove an actual conversion, and if the jury believed that evidence it was sufficient to warrant a recovery. What we have said on this point disposes of the alleged error in giving an instruction upon the same subject.

As to the second contention, while the evidence upon the vital point of conversion is conflicting, there was evidence tending to prove the plaintiff's theory, and the story told by the plaintiff is quite as reasonable as that told by the defendants. The jury saw and heard the witnesses, and its verdict, when approved by the trial judge, ought not to be set aside merely because the evidence is conflicting. We cannot say that the verdict is manifestly contrary to the weight of the evidence.

As to the last contention above stated, there was evidently considerable bitterness displayed between counsel upon the trial, and each was guilty of making improper remarks in the presence of the jury. It is unfortunate that such things should occur in the trial of law suits before a jury, but we have examined the alleged prejudicial remarks of plaintiff's counsel and are unable to say that they did, or could, affect the verdict of the jury. They were contained in questions regarding the result of the proceedings in which Vera Linek was arrested. Objections were promptly sustained by the court, who also told the jury to disregard anything said or done in that case by persons not parties to this case. We think defendants have no good reason to say that they were not given a fair trial.

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

109 - 28385

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. MARY HLAFTUH, Appellee,	APPEAL FROM
vs.	MUNICIPAL COURT
JOHN WLODOVICH, Appellant.	OF CHICAGO.

281 Ill. App. 302

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

The defendant, John Wlodovich, was arrested on a bastardy charge. He was tried by a jury in the Municipal court, found guilty and ordered to pay $1,100 for the support of the child of the relatrix. On this appeal he first urges as a ground for reversal that the verdict is contrary to the evidence. We have examined the evidence and are unable to say that the verdict is manifestly contrary to the weight of the evidence. No stenographic report of the testimony was taken, or at least none is shown in the record before us. The record contains a so-called "statement of facts," consisting of a statement in narrative form of the testimony of each witness. This narrative is palpably inaccurate in several particulars. For example, it purports to show that during the time of the occurrences in question, the relatrix lived at No. 13530 of a certain street in Chicago, and that one of the defendant's witnesses, Mike Tukich, was in the "soft drink business" at the same street number. This is manifestly incorrect, for the record shows that Tukich signed a recognizance for defendant in July, 1924, and also signed the appeal bond in December, 1924, and in each case he gave his address as No. 13521 of the street named, which was defendant's address at the time in question and is across the street from the place where the

relatrix lived. This discrepancy gives color to the suggestion of appellee's counsel that an apparent inconsistency in two of the dates given by the relatrix, viz., the date mentioned by her as the date when she knew she was pregnant, and the date given by her as the date of her first intercourse with defendant, may also be inaccurate or incorrect statements of her testimony, or typographical errors. The story told by the relatrix is not improbable, except as to the first date mentioned, and her story as to her association with defendant is corroborated to some extent by her brother, by a police officer, and by two other witnesses. Their testimony and that of the relatrix, if believed by the jury, would justify the verdict and judgment complained of. It is true that the testimony of defendant's witnesses, as so certified, tends to support the theory of defendant that the relatrix was a prostitute; but their testimony, like the testimony of other avowed accomplices, "is liable to grave suspicion and should be acted upon with great caution." (The People v. McKinney, 267 Ill. 454, 460.) The witness Tukich, as above stated, lived at the same place as the defendant and was his friend and the surety on his bond. Two of the other witnesses were customers of Tukich, and say they started from his place on the night they claim they twice had intercourse with the relatrix. These witnesses were found for the defendant by Tukich, and their story is in some respects improbable, and was flatly denied by the relatrix. The jury are the judges of the credibility of the witnesses, and we have not, as the jury had, the benefit of observing the appearance and manner of these witnesses upon the witness stand. We cannot say, after examining all the evidence, that the jury were not justified in believing the story of the relatrix and in refusing to believe the story told by defendant's witnesses.

It is next urged that the court erred in twice refusing the defendant a continuance upon the alleged ground that the relatrix brought her child into court and stood around in the court room with it, and when ordered to take it from the court room the child cried in an adjoining room so that the jury heard it. It has been held in bastardy cases that it is not reversible error to permit the child to remain in the court room, or to refuse a motion to remove the child from the presence of the jury. (Rose v. The People, 81 Ill. App. 138; Banes v. The People, 121 Ill. App. 103; People v. Moore, 180 Ill. App. 418; The People v. Hnke, 214 Ill. App. 224.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

118 - 28394

RUDOLPH LEDERER, Appellee, vs. ALBERT SABATH and MORRIS SABATH, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I.A. 3

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

The plaintiff recovered a judgment against the defendants for $2,280 in the Municipal court, upon a note for $2,000, dated September 27, 1930, and payable to the order of the plaintiff six months after the date thereof, with interest at six per cent per annum. The note was signed by Albert Sabath and endorsed by Morris Sabath. The plaintiff's statement of claim sets out the note and endorsement in haec verba, and alleges "that after the execution of said note and prior to the delivery thereof" the defendant Morris Sabath placed his signature upon the back thereof as an endorser. The defendants filed an affidavit of merits, in which they do not deny the execution of the note either by the maker or the endorser, but allege that about January 1, 1931, plaintiff retained the defendant Albert Sabath to perform certain legal services upon an agreement with him that in the event he was successful the note should be surrendered; that said defendant successfully performed such services and demanded the surrender of the note, and they therefore deny that they are liable for the payment of the note, "for the reason that same has been paid in full."

Upon the trial plaintiff introduced the note in evidence, proved the amount due, and rested. The defendants

asked several questions regarding conversations between the parties at the time of giving the note. Objections to these questions were sustained. The defendants made no effort to prove the defense set up in their affidavit of merits, except by calling the plaintiff's lawyer to the stand and asking him whether he knew that plaintiff had retained Albert Labath to perform legal services at the time the note was given. An objection to this question was also sustained, for obvious reasons.

On this appeal counsel for defendants merely calls attention to the foregoing rulings and claims the court erred in overruling his objections to the questions asked. We see no error in the rulings. None of the questions sought to elicit any facts which could be a defense to the note by either of the defendants under the issue made by the statement of claim and the affidavit of merits. As to the maker of the note, the note imports a consideration. As to the endorser, where it is alleged and not denied that an endorser placed his name on the back of a note before it was delivered, it is presumed that he received consideration therefor. Moreover, the defense of want or failure of consideration must be specially pleaded to enable a party to make that defense. (Schroer v. Hessell, 89 Ill. 113, 115.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

130 - 28406

SAMUEL W. LOWRY, as assignee of the Para Auto Tire Company, a corporation,
Appellant,

vs.

HENDERSON TIRE & RUBBER CORPORATION,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

The Para Auto Tire Company, hereinafter referred to as the Para Company, was in 1930 a jobber of automobile tires, tubes, etc., with its place of business in Chicago. The Henderson Tire & Rubber Corporation, hereinafter referred to as the Henderson company, was at that time a manufacturer of automobile tires at Columbus, Ohio. The Henderson Company, in February, 1930, had on hand a large quantity of rubber fabric which it desired to sell. It communicated this fact to the Para Company, saying, in substance, that a broker or jobber could handle such sales to better advantage than the manufacturer, for the reason that manufacturers do not care to deal directly with each other in such matters because none wants its competitors to know what quantity of fabric it may have on hand, or may need in its business. The usual brokerage on such sales appears to be two per cent. On February 9, 1930, the Para Company telegraphed to the Henderson Company: "Can sell seventy thousand pounds fabric. Offered dollar fifty net ten days. You bill goods. Customer responsible. For February March April shipments. also find it necessary pay other party two percent brokerage making total cost to you four percent. wire answer." To this telegram the Henderson Company replied, on the same day: "Accept offer seventy thousand pounds fabric

equal shipments February March April at one dollar fifty cents less four percent brokerage but must be sight draft regardless of responsibility. Fabric in original packages. Must have bona fide order by noon tomorrow." On February 12, 1920, the Fara company sent to the Henderson Company a formal "purchase order" for "about seventy thousand pounds" of a specified kind of rubber fabric at the price of $1.50 a pound, "brokerage of 4%," to be delivered during February, March, and April, 1920, with directions to ship by freight, consigned to Overland Tire & Rubber Co., Omaha, Nebraska. Included in the order is a statement that the Fara Company reserves the right to countermand any part or all of such order prior to the date of shipment. On February 17, 1920, the Henderson Company, by wire, "acknowledged receipt" of this order "on basis your guarantee payment our sight draft," and on February 18, 1920, the Fara Company wired: "We guarantee payment sight draft attached material shipped on our order." On February 27, 1920, the Henderson Company wrote to the Fara Company: "We are today shipping to the Overland people S D/B L, one car containing 25,054 lbs. fabric and will bill same at $1.50 per lb. and draw on them for $37,581. Immediately upon receipt of remittance for this draft, we will send you your commission. In the meantime, will you kindly have these people lift the draft, attached to which is the B/L." From the correspondence that followed it appears that the shipment was slow in arriving at Omaha, and that the Overland Tire Company at that place did not take up the bill of lading and pay the sight draft attached thereto until after the goods arrived in Omaha. Eventually, however, the goods arrived there, and the draft was paid by the Overland Tire Company, and the Henderson Company paid the Fara Company a broker's commission of four per cent upon the agreed price of the goods. The correspondence also shows that the

Henderson Company became very impatient on account of the delay in paying the draft, because in the meantime the market price of such fabric had advanced twenty-five cents a pound.

On March 22, 1920, the Para Company wrote to the Henderson Company calling attention to the fact that the "purchase order" of February 13, required further shipments to be made in March and April, and asking whether any further shipment had been made. To this the Henderson company replied, under date of March 25, 1920: "Inasmuch as you wish us to continue the shipments to the Overland people, will do so, or, in other words, will make them one more shipment and see if they will pick up the draft on presentation, as this is the usual terms in selling fabric. On the first car we shipped they held us up over 30 days, and inasmuch as we can now sell this same fabric for at least 25¢ more perpound, will have to insist that they pick up the draft upon notification by the bank." Not hearing from the Para Company in reply to this letter, the Henderson Company again wrote, on April 5, 1920, asking "whether we are to ship against the order, with the understanding that they will honor draft upon presentation, or whether the remainder is to be cancelled." To this the Para Company replied by telegram, as follows: "Make shipment second lot fabric Overland. They will honor draft upon presentation." On May 14, 1920, the Henderson Company wrote to the Para Company that on May 7, 1920, a second shipment of 30,922 pounds of fabric had been made to the Overland Company, "S/D against B/L," at a total price of $46,383.

It appears that upon the arrival in Omaha of the second shipment, the Overland Tire Company informed the Para Company that "it was not then in a position to take up the shipment promptly," and suggested placing the material in storage, offering to defray all expenses in connection therewith and to pay interest in the meantime at the rate of seven per cent per annum. The Para Com-

pany, on May 27, 1920, communicated this offer to the Henderson Company, adding that if that company chose to accept the Overland Company's offer, the Para Company would be willing to waive its four per cent commission on that shipment, amounting to about $1,800. To this the Henderson Company replied on May 28, 1920, that it was "utterly impossible for us to act as you request," and insisted that the draft be taken up immediately. The Para Company did not reply at once, and on June 5, 1920, the Henderson Company wired the Para Company, demanding "immediate settlement," and threatening to place the matter in the hands of attorneys unless the draft was paid at once by the Para Company, under its "order and guarantee." On June 8, 1920, the Para Company wrote that it had received word from the Overland Company that the latter would be able to take up the shipment in about ten days, adding: "We appreciate the annoyance this delay has caused all of us, and we will permit to be deducted from the commission due us, after you receive the returns, any additional expense to you, such as interest, or other legitimate charges." To this, the Henderson Company replied, by wire: "Your letter eighth positively cannot accept terms named. We insist upon payment today." Before this telegram was received, the Para Company wrote, on June 9, 1920, that it had finally received definite assurances from the Overland Tire Company that the latter would be in a position to take up the draft on July 25th, and suggesting that the Henderson Company recall the shipment, offering to pay all transportation charges, demurrage and interest; or, if the Henderson Company would prefer to have the material placed in storage at the expense of the Overland Tire Company, that company would pay interest at the rate of seven per cent., and the Para Company would release its claim for a commission on the sale. To this letter the Henderson Company again replied: "It is utterly impossible for us to act on your suggestion. * * There is but one thing that can be done,

and that is to make good your guarantee. * * If we do not receive a reply by return mail, we will forward all papers to our attorney * * and our instructions to him will be that no settlement can be made only on the basis of having the draft honored less your commission, without further delay." Not hearing from the Para Company by return mail, the Henderson company placed the matter in the hands of its secretary and attorney, George C. Riley, of Buffalo, New York.

On June 15, 1920, Riley wrote to the Para Company, reviewing some of the correspondence and claiming that the Para Company had made itself liable as principal, both by the terms of the original order and by its guarantee of payment of the sight draft, and stating that unless the draft was "taken up" by the end of the week, "the shipment and the balance of material due under your contract, amounting to approximately 15,000 lbs. will be sold at public auction for your account, and immediate suit will be brought for the difference between the amount realized and the contract price, with accrued charges." In reply to this, the president of the Para Company wrote a long letter to Riley, stating that while the material was shipped "on our order," yet the same order shows that the Para Company were mere brokers in the transaction and were to receive a brokerage commission of four per cent; that the order called for shipments to be made during February, March and April, while in fact the first shipment was not made until March, nor the second until May; that this delay in making shipments was "the real cause for the Overland Tire Company not being in position to take up the goods ere this;" that the Overland Company had finally agreed to take and pay for them in July; that the Para Company had offered to release all claims for commissions in case the Henderson Company could handle the matter "until the consignee could take up the shipment;" that "our Mr. Lowry" would per-

sonally visit the Overland people "to see what can be done for the interest of all concerned," and would wire the result to Riley. The letter closes by asking the Henderson Company "to cancel any balance which may be due on the order, which, you will notice, is a right which we reserved on the face of the order."

To this letter Riley replied that the Henderson Company at all times had insisted that the Para Company "must not only assume the obligation of the purchase, but guarantee the payment of the sight drafts accompanying the bill of lading of each shipment;" that his client "cannot be expected to listen with much complacency to any further contention that you have no liability under the contract," and that unless the draft was paid within two days he would resell the material, to fix the amount of the Henderson Company's claim against the Para Company "both under the purchase order and your guarantee," and would thereupon forward the papers to Chicago for suit.

Instead of forwarding the papers, however, Riley went to Chicago himself. There he met the general manager of the Para Company and the president of the Overland Tire Company, and after some negotiation, a written agreement was drafted and signed by all of them. This agreement is dated June 23, 1920, and recites that whereas, the Henderson Company sold to the Para Company 30,922-3/4 pounds of tire fabric, which, by order of the Para Company, was shipped to the Overland Tire Company "on a resale thereof," and the Henderson Company "has drawn its draft for the purchase price thereof" amounting to $46,385, which draft has remained unpaid, with the result that said shipment had been placed in storage by the railroad company in the City of Omaha; and whereas, the parties had agreed to an extension of the time of payment of such purchase price, "with freight, storage, demurrage, and all other expenses incident to the ultimate collection of

said amount," therefore, "in consideration of the payment" by the Para Company to the Henderson Company of the sum of $4,000, "receipt whereof is hereby acknowledged" (and which sum the Overland Tire Company therein agreed to repay to the Para Company on or before August 1, 1930) and in consideration of the mutual agreements "herein contained," it was agreed that the Overland Company should pay the Henderson Company on or before June 26, 1930, the further sum of $6,000 to apply on said purchase price, and that "the party of the first part" (viz: the Para Company and the Overland Tire Company) should pay the Henderson Company the balance of such purchase price, together with all freight, storage and other charges, by taking up a draft therefor which the Henderson Company should draw on the Overland Tire Company, payable August 1, 1930, whereupon said materials were to be delivered to the Overland Tire Company. By the fifth clause of the agreement it was provided that: "Each of the parties of the first part hereby agree to the modified terms of the sale herein contained to pay the amounts herein agreed upon to the party of the second part" (the Henderson Company.)

This agreement was eventually fully carried out. The final payment was made on March 1, 1931, whereupon the materials were delivered to the Overland Tire Company. The Para Company then assigned its claim for a brokerage commission on the sale of the second carload, to Samuel W. Lowry, who was its general manager at the time of these transactions, and he, as such assignee, brought suit in the Municipal Court to recover the amount of such commission, with interest thereon from March 1, 1931, basing the claim upon the order of February 12, 1930, and the acceptance thereof and delivery of goods thereunder, by the defendant. The affidavit of merits set up, as defenses to the claim, first, that the Para Company's claim for commission was waived and released on June 25, 1930; and,

second, that all the parties, on that day entered into a new agreement, "partly verbal and partly in writing," which (it is alleged) "superseded all their reciprocal rights and obligations theretofore existing under said first contract and the breaches thereof." Upon a trial before the court without a jury, the court found the issues in favor of the defendant, and from a judgment entered upon that finding, this appeal was perfected.

The main question raised by this record and by the briefs of counsel, is whether the Para Company, by entering into the written contract of June 23, 1920, waived or released its claim under the original contract for a brokerage commission on the sale of the second carload of tire fabric. The second contract makes no reference whatever to such commission; but defendant's counsel contend that the language contained in the preamble to that contract and in the fifth clause thereof, shows that the Para Company contracted as a principal in the transaction instead of a mere broker or guarantor, and thereby, in effect, waived its commission on the sale of the goods. The argument is that these provisions of the second contract show that all parties thereto intended it to supersede and cancel the original contract, not only as to the terms of payment for the second shipment, but also as to the commission specified in the first contract. We are unable to agree with this contention. The preamble to the second contract recites that the Henderson Company had sold to the Para Company a specified number of pounds of tire fabric, "which, by order of the Para Company" had been shipped to the Overland Tire Company "on a resale thereof;" that the Henderson Company had "drawn its draft for the purchase price thereof, amounting to the sum of $46,383," which is the purchase price mentioned in the first contract; that such draft was not paid, with the result that the goods had been placed in storage by the rail-

road company in Omaha; and that the parties had "agreed to an extension of the time of payment" of such purchase price. Then the agreement specifies the terms of the extension so agreed upon, being in substance, the payment of $10,000 within three days, and the balance on August 1, 1930; and by the fifth clause, both the Para Company and the Overland Company specifically agree "to the modified terms of sale herein contained." The agreement, as written, does not purport to modify or change any part of the original contract, except the terms of payment of the purchase price of the second shipment, plus storage charges and interest. The use of the words "modified terms of the sale herein contained" implies that, except as therein specified, the terms of sale, as originally agreed upon, remain unaffected by that agreement. The brokerage commission is not so specified in the second agreement, nor is it mentioned or referred to in any manner whatever. No new agreement as to such commission was thereby made, and we think there is nothing in the language of that agreement when considered in connection with the original contract, which shows that the parties intended the second agreement to cancel the provisions of the original contract as to commissions. The mere fact that the preamble states that the goods were "sold" to the Para Company and resold by it to the Overland Company (for the same price) can not, of itself have that effect, in view of the purpose of the agreement as therein expressed.

Furthermore, defendant's counsel did not rely in the trial court and do not wholly rely in this court, on the contention that the second agreement shows on its face that the plaintiff intended thereby to waive or release its claim for the commission in question. In the defendant's affidavit of merits, it is stated that after the second shipment was made a dispute arose between the parties as to their several rights and liabilities under the original contract and that on June 23, 1930, they entered into a

new agreement "partly verbal and partly in writing," which superseded the other. Upon the trial, defendant's counsel stated that this was the theory upon which he offered in evidence the letters, telegrams and other documentary evidence above mentioned, and the oral testimony of Riley and Henderson; and all this evidence was admitted on that theory, over the objection of plaintiff's attorneys.

It is earnestly insisted by plaintiff's counsel that it was reversible error to admit this evidence upon the trial. We think there is much force in this contention, but as we view the evidence, we need not stop to inquire or decide whether it was error to admit it, for the reason that in our opinion the evidence so offered and admitted does not sustain the theory stated in defendant's affidavit of merits. The letters and telegrams clearly show that the transaction originated in a request by the defendant that the Para Company assist the defendant in disposing of its tire fabric on a commission basis; that the Para Company, on that basis, procured an offer from the Overland Tire Company of $1.50 a pound for 70,000 pounds of such fabric, and wired that offer to the defendant, without giving the name of the purchaser, but saying: "You bill goods. Customer responsible," and also stating that the "brokerage" would be four per cent; that the defendant at once wired its acceptance of the offer so made (mentioning the "four per cent brokerage") on condition that payment should be made by sight draft, and asking for an order, on that basis; that the Para Company thereupon wrote the substance of the Overland Company's offer and defendant's conditions upon a printed form of "purchase order," with directions to ship the goods to the Overland Tire Company at Omaha, and to collect the purchase price from it by sight draft attached to the bill of lading; that this so-called "purchase order" was accepted by defendant upon a further condition that the Para Company guarantee

the payment of the sight draft, to which the latter agreed, and thereupon the first carload was shipped to and paid for by the Overland Company; whereupon the defendant paid the Para Company its agreed brokerage commission of four per cent upon the price of that shipment. The correspondence further shows that the second carload was shipped in the same way, on the same order and guarantee of payment, and that when the Overland Company did not "take up" the sight draft for the price of that shipment, the defendant insisted that the Para Company must pay the draft; that the latter thereupon offered to waive its commission on certain conditions, but its offers were twice rejected by defendant, who demanded immediate payment for its goods. This was the situation when the second agreement was made.

In the trial court the witness Riley was permitted, over the objection of the plaintiff, to relate what he claimed was said at the conference which then took place and which resulted in the preparing and signing of the second agreement. Riley testified that he told the representatives of the Para Company and the Overland Company, who were then present, that he had come to Chicago for the purpose of settling the matter "on the basis of the letter" of the president of the Para Company of June 17, 1930, (which contained one of the offers to waive its commission conditionally, and which offers had been refused) "if a substantial payment could be made that day;" that he was ready to "make a new deal" on that basis; and that the agreement of June 23, 1930, was made on that understanding. The witness Henderson was also permitted, over a like objection, to testify that he told the representative of the Para Company, over the long distance telephone, that he would expect that company "to waive their earnings on the proposition."

The testimony of the witness Riley on this point was flatly contradicted by the testimony of the president of the

Overland Company, the secretary of that company, and the general manager of the Para Company, all of whom testified that no such statement was made by Riley, and that the question of commission was not mentioned or discussed in any manner in that conference. The testimony of the witness Henderson is likewise flatly contradicted by the testimony of the witness Lawry, who testified that he called up Henderson on the long distance telephone merely for the purpose of protesting to him against Riley's refusal to accept, after the close of banking hours, a check that was not certified, and that the subject of commissions was not mentioned or discussed.

We think the story as told by these witnesses for the plaintiff is more reasonable, probable and credible than the evidence of Riley and Henderson, when all the facts and circumstances in evidence are considered. While the correspondence between the parties shows that the Para Company had twice offered to waive its commission if the Henderson Company would store the goods in Omaha at the expense of the Overland Company, and give the latter time to pay for the same, it also shows that both such offers were promptly and emphatically rejected by the Henderson Company, who had twice threatened to sue if payment was not made immediately. When Riley came to Chicago, therefore, it is evident that he came to demand immediate payment in full, and not for the purpose of accepting offers which had been twice refused. What Riley accomplished by the agreement of June 23, 1920, was a payment of $10,000 within three days from the Overland Company, on account of the original purchase price, and an agreement with the Overland Company, guaranteed by the Para Company, to pay the balance within a little more than a month thereafter, including all the cost and expense of the delay.

It appears from the testimony that Riley was a lawyer of experience and was the only lawyer present when the second

contract was prepared. It is difficult to believe that a lawyer of any experience would wholly omit from a contract prepared by him under such circumstances, any mention whatever of the release of a claim of over $1,800, which, he testified, he verbally told the other parties was the "basis" upon which the contract was made. The president of the Overland Company and its secretary testified that in the conversation that occurred at that time they did not ask for a new contract; that all they asked for was a "rearrangement of terms" or for "better conditions to make payment." This is corroborated by the express language of the contract. If, under such circumstances, the defendant, or its attorney, Riley, really intended that the Farm Company should waive its commission, as well as to advance $4,000 of the price due from the Overland Company, and guarantee the payment of the balance, it is unfortunate for the defendant that such intention was not manifested in some way by apt language in the contract prepared by its attorney.

It follows from what we have said that we are of the opinion that the court erred in finding the issues for the defendant. As the case was tried without a jury, and as the record shows that both parties offered all the evidence they have bearing upon the questions at issue, it will not be necessary to remand the cause for a new trial, but the judgment will be reversed and a judgment will be entered in this court in favor of the plaintiff, and against the defendant, for the sum of $2,086.84 being $1,855.52 (which is four per cent of the agreed price of the second carload of fabric) with interest thereon from March 1, 1921, to the date of filing this opinion.

REVERSED WITH A FINDING OF FACTS AND JUDGMENT HERE.

Gridley, P. J., and Barnes, J., concur.

130 - 28406

FINDING OF FACTS.

The court finds that the facts stated in the plaintiff's statement of claim have been proved and are true as therein stated; that on March 1, 1921, there was due and owing from the defendant to the Para Auto Tire Company the sum of $1,855.32 for brokerage commission upon the sale of tire fabric as described in the plaintiff's statement of claim; that no part of such brokerage commission has ever been paid, waived or released, and that the claim of said Para Auto Tire Company for said commission was duly assigned by it to the plaintiff, Samuel S. Lowry, before this suit was begun in the Municipal Court of Chicago.

FINDING OF FACT.

162 - 28438

ARTHUR WEISS & CO.,
Appellee,

vs.

MAX GOLDSTEIN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 N.A. 303

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment against him for $480, but he shows no good reason why the judgment should not stand. He claims the trial court erred in refusing him a continuance on account of the absence of witnesses. His motion for a continuance was made orally when the case was called for a jury trial, nearly four months after it was begun. No affidavit was filed with the motion, nor did the oral motion state what such absent witnesses would testify to, if present, or show any diligence whatever in securing their presence in court at the trial. The plaintiff sued on a written contract dated in 1917, which recites that plaintiff had loaned $600 to defendant which defendant agrees to repay "in labor, on the basis of ten per cent of the total labor he delivers during each individual week." The defense was payment, but the defendant twice testified, in answer to questions put by the court, that he did not know how much labor he had "delivered" under this contract. He testified that when he received the $500 he was in the business of "contracting ladies' dresses," and had a shop in which he employed labor in making such dresses; that plaintiff was to furnish him with materials to be made into dresses; that he, defendant, made "one or two deliveries" of that kind thereafter, but did not remember the amount of labor included

in such "deliveries," and that he ran his shop ten or twelve weeks after the contract was signed, and then closed the shop for lack of work. The plaintiff's statement of claim admitted a credit of $20, indicating that $300 was the total amount of labor included in all deliveries made by the defendant, of which amount ten per cent was applied towards the repayment of the $500 loan. There is nothing in the stenographic report of the proceedings at the trial tending to show that defendant's absent witnesses, if present, would have known any more about this transaction than defendant himself, and his evidence did not tend to prove that he had paid more than the amount for which he had been credited by the plaintiff.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

171 - 28447

ROSE LOTESTO et al.,
Appellants,

vs.

THOMAS W. ROBERTSON,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK CO[redacted].

231 I.A. 503

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

On October 23, 1919, the plaintiffs and the defendant entered into a written contract for the purchase and sale of a brick building in Chicago for the sum of $9,500. By the terms of the contract, the defendant agreed "to convey to said purchaser a good and merchantable title thereto by contract for general warranty deed," subject to existing leases, taxes and special assessments, party wall agreements and building restrictions of record, and an incumbrance of $4,000 to be placed on the property by defendant, which incumbrance the purchasers assumed and agreed to pay as part of the purchase price. The contract recites that "said purchaser has paid $500 as earnest money to be applied on such purchase when consummated, and agrees to pay within five days after the title has been examined and found good, or accepted by him," the further sum of $3,000, "provided a good and sufficient contract for general warranty deed, conveying to said purchaser a good and merchantable title to said premises (subject as aforesaid) shall then be ready for delivery;" the balance of $2,000 to be paid in six monthly installments within "six months next succeeding the date of contract for warranty deed herein, the purchasers to be entitled to deed when said monthly payments are made." The contract further provides that a merchantable abstract of title shall be

furnished by the vender within a reasonable time, and that the purchasers' attorney, within ten days thereafter, shall deliver to the vender a written opinion specifying in detail the objections, if any, to the title; that "in case material defects be found in said title and so reported, then if such defects be not cured within sixty days after such notice thereof, this contract shall, at the purchaser's option, become absolutely null and void, and said earnest money shall be returned, notice of such election to be given to the vender; but the purchaser may nevertheless elect to take such title as it then is, and in such case the vender shall convey as above agreed; provided, however, that such purchaser shall have first given a written notice of such election, within ten days after the expiration of said sixty days, and tendered performance hereof on his part. In default of such notice of election to perform and accompanying tender within the time so limited, the purchaser shall, without further action by either party, be deemed to have abandoned his claim upon said premises, and thereupon this contract shall cease to have any force or effect as against said premises or the title thereto, or any right or interest therein, but not otherwise." The contract also provides that the earnest money shall be held by a specified agent "for the mutual benefit of the parties concerned."

The abstract of title was not delivered to the plaintiffs until about March 1, 1920. Plaintiffs then delivered it to their lawyer, who, on March 20, 1920, gave a written opinion specifying a number of objections to the title, including one to the effect that the record title was in defendant and his wife, that defendant appeared to be a widower, but there was nothing in the abstract to show the death of his wife, or that any proceedings had been had in the Probate court in

references to her estate. A copy of this opinion was delivered to the defendant, who, on April 7, 1920, wrote to the plaintiffs, stating that his wife died on April 29, 1918, leaving two adult children; that in order to save the delay incident to Probate court proceedings, these children had executed a quit claim deed to the defendant of their interest in the property, and that he, defendant, had "full and legal title in himself now." He added that the other objections in the opinion of title "can be considered in the drawing of the warranty deed, * * * and such objections can be satisfactorily and legally smoothed out at that time."

Following this letter, the plaintiffs' attorney had several conversations with the defendant, in the last of which defendant stated that he would not "probate the estate" and would not go to any more expense in the matter, "as the purchasers were getting the property cheap." The lawyer offered, on behalf of his clients, to pay the expense of the court proceedings, but defendant declined to do anything further in the matter. Thereupon, on June 11, 1920, the lawyer wrote the defendant stating that as the sixty days allowed by the contract to cure objections to the title had expired, and as he had failed to cure the objections, the plaintiffs would hold him responsible for damages sustained by reason of his alleged "breach of contract in (not) making good the title to said property." One of the plaintiffs testified that she did not know this letter of her lawyer was sent to the defendant, and that before it was sent, viz., about May 1, 1920, she demanded the return of the $500 deposited as earnest money; that she told the agent who held this deposit "that the purchase did not go through, that Mr. Robertson did not want to sell the property any more, and that I wanted my money back." She further testified that the agent did not at once return the

money, and that she brought suit against him for the $500 deposited, whereupon "he settled."

There was a trial before a jury in the Circuit court, and at the close of all the evidence, on motion of defendant, the court instructed the jury to find the issues for the defendant, which was done, and from a judgment entered thereon the plaintiffs appeal.

The plaintiffs contend that the language of the contract above quoted gave to the plaintiffs an option to declare the contract null and void in case defects in the title were not cured within sixty days after notice thereof was given to defendant; that plaintiffs, however, did not exercise their option in that respect, but on the contrary, demanded that defendant cure such defects in the title; and that when he refused to do so, he became liable in damages for a breach of his contract "to convey to the plaintiffs a good and merchantable title to said premises." The words last quoted are followed in the contract by the words: "by contract for general warranty deed;" that is, the agreement of the defendant was merely to give a contract for a warranty deed upon the payment of $3,000 in addition to the earnest money, and the warranty deed was not required to be executed and delivered until six months later, and then only in case the purchasers should have paid the further sum of $2,000. There is nothing in the evidence to show that the defendant refused at any time to execute such a contract for a warranty deed. The defendant, in his letter of April 7, 1930, in answer to the objections raised by the purchasers' attorney, claimed he had quit claim deeds from the heirs of his deceased wife, and would be able to "satisfactorily and legally smooth out" the other objections to the title by the time the purchasers had completed their payments. There is no direct evidence tending to prove that this claim of defendant was not

well founded; and without such evidence, he could not be held liable for breach of his contract.

Furthermore, the evidence shows, without contradiction, that after this letter of the defendant was written, the plaintiffs' attorney endeavored to induce the defendant to begin proceedings in the Probate court, and that defendant refused to do so; whereupon one of the plaintiffs demanded the return of the earnest money from the agent who held it in escrow, telling him that "the purchase did not go through" and therefore she "wanted" her "money back," and after some delay, the earnest money was returned to her. This act of such plaintiff was to all practical intents and purposes an exercise, on the part of the purchasers, of their option to declare the contract null and void because of the failure of defendant to cure the alleged defects in the title; for by the express terms of the contract it was only in case the purchasers exercised their option to declare the contract null and void that they were entitled to the return of the earnest money. It is true that the contract provides that written notice of the exercise of such option shall be given "to the vendor;" but such a written notice may be waived by the person entitled thereto, and the oral demand by the purchasers for the return of the earnest money was just as effectual to show their election to abandon the contract as a written notice of such election would have been.

Plaintiffs' counsel insist that even though there was evidence that Mrs. Lotesto demanded and received the return of the earnest money, her act did not bind the other plaintiff. We think this contention is without force. The other plaintiff did not testify. In Mrs. Lotesto's testimony, she said she paid the $500 earnest money to the agent who held it in escrow, and refers to it as "my $500." She testified that she talked "quite a few

times" to the agent about "my $500," and that she got it after she had sued the agent. The other plaintiff is her mother, and it is apparent from the reading of the abstract of the evidence that the daughter was the one who conducted the negotiations and acted for both herself and her mother throughout the whole transaction.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

187 - 28463

MARSHALL FIELD & COMPANY,
a corporation,
Appellant,

vs.

LOUIS E. WINICK,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 603

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

On March 21, 1921, plaintiff sued the defendant in the Municipal Court in an action of tort. The statement of claim consists of a common law count in trover for the value of $1,000 worth of sheeting which it is alleged plaintiff casually lost and defendant found and refused to return on demand. To this is added an averment that defendant maliciously converted such goods to his own use with intent to defraud the plaintiff. In this statement of claim, the plaintiff demanded a jury trial. On March 28, 1921, defendant filed a special appearance "for the sole purpose of questioning the jurisdiction" of the court. On April 1, 1921, he also filed an affidavit of merits alleging that he was a bankrupt, that bankruptcy proceedings were pending in the United States District court for the Northern District of Illinois, in which the claim of the plaintiff had "been duly scheduled and is a dischargeable debt," that an order had been entered therein restraining the plaintiff from prosecuting its suit in the Municipal court until the further order of the United States Court and until the question of the bankrupt's discharge is determined, and that a certified copy of said order had been served on the plaintiff, and another such copy had been filed with the clerk of the Municipal Court. No order of the Municipal court staying its proceedings pending the

[illegible]
[illegible]
[illegible]

bankruptcy proceedings was entered or requested.

It further appears that no further proceedings were had in the Municipal Court until July 18, 1933, when, the record shows, the case was regularly called for a jury trial; that plaintiff appeared, but defendant was absent and was not represented by counsel; that thereupon leave was given to the plaintiff to amend its statement of claim "on its face instanter;" that a jury was then called, evidence heard, a verdict returned, finding defendant guilty and assessing damages at $781.84, and a judgment entered thereon. The transcript of the record also contains what seems to be a special finding of facts, unsigned, to the effect that defendant "willfully and maliciously took, received, or accepted from the plaintiff" the goods described in the statement of claim, and refused to deliver them on demand, and had converted the same to his own use with the intent and design to deprive the plaintiff of its property.

Fifty-seven days after the entry of said judgment the defendant filed a petition to vacate the same. This petition recites the facts above stated regarding the restraining order and the trial and judgment in defendant's absence, states that the defendant had been discharged in bankruptcy, that the claim of the plaintiff is a "dischargeable debt in bankruptcy," and that in addition to that defense he "has a further defense," viz., that he returned to the plaintiff merchandise of the value of $781.74 "by delivering same to the plaintiff's wagon," which called at defendant's place of business, and 'gave him a receipt" for the same. The petition then prays that the capias ad satisfaciendum be quashed, that the verdict and judgment be set aside, and that a new trial be granted. The bill of exceptions recites that this petition and a demurrer ore tenus

thereto were heard and that after argument the court quashed the capias, vacated the judgment, and granted a new trial. From this order the plaintiff appeals.

Counsel agree that the only power the trial court had to vacate a judgment more than thirty days old is to be found in that part of section 21 of the Municipal Court Act which authorizes that court, on motion, to correct "errors of fact" in its proceedings such as might have been corrected at common law by a writ of error coram nobis. Counsel further agree that the power of the court under that section is limited to the correction of such errors of fact as are not apparent on the face of the record. Plaintiff's counsel contend that no such error of fact is shown in this case, because the defendant's petition to vacate consists of a recital of facts that appear on the face of the record, all of which were, or should have been, known to the court when the judgment was entered. To this contention, defendant's counsel reply by asserting that the "half-sheet" of the Municipal court does not show that the appearance filed by defendant was a special appearance. This so-called "half-sheet" is not in the record filed in this court. It appears here for the first time in the briefs of defendant's counsel. But if it were properly in the record, and if it could be assumed, without any certificate of the trial judge, that at the time the judgment was entered the judge looked only to the "half-sheet" and did not look at the appearance and affidavit of merits on file and was misled by so doing, we certainly cannot assume further - in the absence of such certificate - that the trial judge permitted the plaintiff's statement of claim to be amended "on its face," a jury trial to be had in the absence of defendant, a verdict returned, and a judgment entered authorizing the issuance of a capias ad satisfaciendum, without looking at the appearance or affidavit of merits on file. Even if we could so assume, the

failure of the trial judge to look at papers that were a part of the record would not constitute an error of fact such as could be corrected on motion made more than thirty days after the judgment was entered, for the reason that under such circumstances the court would be chargeable with notice of such facts as an inspection of the papers on file would disclose.

Furthermore, an error of fact which may be assigned in the trial court, upon a motion in the nature of a writ of error coram nobis, must relate not only to some fact that was unknown to the court at the time the judgment was rendered and which was not apparent on the face of the record, but such fact must be one which, if known, would have precluded the rendition of the judgment. (Chapman v. North American Ins. Co., 392 Ill. 179, 185.) The facts stated in the affidavit of merits are not such facts. The Municipal court did not lose its jurisdiction of the case by reason thereof. (Moynton v. Hall, 191 U. S. 457, 467.) They might have been made the basis of an application to the trial court for a stay of proceedings, but that was not done; and if the mere filingof such affidavit and a certified copy of the restraining order could be treated or considered as amounting to such an application, the action of the trial court, in ignoring the same, if error, was an error of law and not an error of fact. Moreover, even if an order of discharge in bankruptcy had been entered and that fact had been made to appear in the trial, such discharge would not, as a matter of law, preclude the Municipal court from entering a judgment against the defendant upon proof of a willful and malicious injury to the personal property of the plaintiff, as charged in the plaintiff's amended statement of claim. (McIntyre v. Kavanaugh, 242 U. S. 138.)

Apparently the amendment to the statement of claim was made without notice to the defendant. But whether the

action of the court, in allowing such amendment under such circumstances, was error, is not involved on this appeal. If it was error, it was an error of law and not an error of fact.

The alleged "further defense" of the defendant, to the effect that he had returned the goods to the plaintiff, was first made more than thirty days after the judgment was entered, and no reason appears in the record why it should not have been made before, or at, the trial. There is an utter absence of any proof of diligence in presenting that defense; and therefore the order vacating the judgment cannot be sustained on that ground.

The order of the Municipal Court vacating the judgment will be reversed.

ORDER REVERSED.

Gradley, P. J., and Barnes, J., concur.

196 - 28472

EMMA COCHRAN,
Appellee,

vs.

ELABORATED READY ROOFING COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 30

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse a judgment against it for $1,890 rendered by the Municipal Court upon a trial without a jury, for money which Emma Cochran, the plaintiff, claims she deposited with the defendant company upon the agreement of said defendant to repay the same to her upon demand, with interest. In its affidavit of merits the defendant does not deny that it received the money in question, but claims that it had "no business relations" with the plaintiff with reference thereto, and denies that it ever gave her credit for the same, or promised to pay her interest thereon. The affidavit asserts that the moneys referred to in plaintiff's statement of claim "probably have to do" with an account which defendant had with one Clarence C. Cochran, who for many years deposited money with defendant, all of which, "so far as the defendant has any information," belonged to him; that he is dead, and before his death, he withdrew all of the money so deposited except $402.09; and that many of such withdrawals "were probably made on behalf of Emma Cochran, the plaintiff." The affidavit was amended upon the trial by adding, as "an additional defense," that Clarence C. Cochran acted as the agent of the plaintiff in making the deposits claimed by her, and that such deposits "were mingled with the account of said Clarence C. Cochran," and that he had full control of, and power

to withdraw, the same.

Clarence C. Cochran was the plaintiff's brother-in-law. He died in February, 1922. For years before his death he worked for the defendant company and lived at the home of the plaintiff. Beginning in 1906, he had a savings account with the defendant company, upon which the defendant paid him interest at the rate of six per cent per annum. The plaintiff knew he had such an account with the defendant and that the defendant paid him six per cent interest. She was called as a witness by the defendant and testified that Clarence Cochran told her that the defendant company was safe and reliable and "worth millions," and that "he said it was all right for me to put my money there, which I did;" that on August 16, 1918, she handed him a check she had received for $1,958.84, and requested him to open an account for her with the defendant, and that he brought back to her defendant's receipt for the same. Defendant's bookkeeper testified that when Clarence Cochran brought the check to the defendant's office, he handed it to Mr. Levis, defendant's secretary and treasurer, saying to him: "Herbert, here is a check;" that Levis "started to write out a receipt to Clarence Cochran," but the latter said: "I don't want a receipt myself, I want a receipt made to Emma Cochran;" that Levis said: "What do you want that made out to Emma Cochran for?" to which Clarence Cochran replied: "In case anything happens to me she is always able to get the money;" that "he said he wanted to be sure that Mrs. Emma Cochran got any money left, the balance of the account." Thereupon Levis gave Clarence Cochran a receipt reading as follows: "Aug. 16, 1918. Received of Emma Cochran Nineteen Hundred Fifty-eight Dollars Twenty-four Cents, with interest at 6%. Elaborated Ready Roofing Co., By J. A. Levis, Secy. & Treas." Instead, however, of opening an account with the plaintiff, defendant credited

the deposit so made to the account of C. C. Cochran.

On three later occasions deposits aggregating $210, of plaintiff's money, were made with the defendant, through C. C. Cochran. On each of these occasions, the defendant gave receipts stating it had "received from Mrs. Emma Cochran" the money so deposited, followed by the words: "Savings Account." It does not appear what, if anything, was said by C. C. Cochran when these receipts were given him by defendant, but apparently these deposits were also credited to C. C. Cochran's account.

In December, 1918, defendant gave C. C. Cochran two checks, one for $600 payable to a trust company, and one for $100 payable to one Cremens. The plaintiff, answering questions put by defendant's counsel, testified that she asked her brother-in-law to get these checks from defendant, the first to pay a mortgage on her property, and the last to pay a bill she owed, giving him in each case a note to Mr. Levis, asking for the same; but Levis testified that he never "received any instructions" from her regarding the account, and that these checks were charged to the account of C. C. Cochran.

When Clarence Cochran died, the plaintiff went to the office of the defendant and asked how much money there was in his account. Levis examined the ledger and told her it was $402.09. She said: "That is fine. Now what is my account?" Levis replied: "You have no account with us." The plaintiff said: "Why surely I have; here are my receipts," exhibiting the four receipts above mentioned. Levis testified that he then told her that Mr. Cochran had told him to put "that money" in his account, which had been done, and that "Clarence has been sick for a year or two and has not earned anything and has drawn money every week on his account;" to which the plaintiff replied: "Yes, I often wondered if he was not spending my money, and not his own."

The theory of the defense made to the plaintiff's claim is that throughout the transactions in question the defendant dealt with Clarence Cochran alone, without any knowledge that he was acting as the agent for the plaintiff, and that therefore all payments made by it to Clarence Cochran were properly made and should have been allowed as credits in this suit. It is insisted that nothing was said or done in these transactions sufficient to charge the defendant with knowledge of the fact that Clarence Cochran was acting as the agent of the plaintiff. If it were not for the receipts given by defendant, there might be force in the defendant's contention. These receipts, however, were all made in the name of the plaintiff, and not in the name of Clarence Cochran, and all of them contain language importing an agreement by defendant to repay the sums of money specified therein, with interest, to the plaintiff on demand. These receipts, unexplained, made a prima facie case for the plaintiff. The only explanation made for the giving of such receipts, if defendant did not intend to be bound by them, as written, is that Clarence Cochran said he wanted something to show that the plaintiff would be entitled to what was left in his savings account "in case anything happened" to him. Nothing of that sort appears on the face of the receipts. It would have been a simple matter, in giving such receipts, to have so written them as to express or indicate that such was the understanding, if it was; and the failure of defendant to insert in its receipts anything whatever from which such an understanding could possibly be implied, tends strongly to prove that no such understanding, in fact existed. That the defendant would give such receipts in the face of such an understanding with Clarence Cochran, is highly improbable. If, however, such was the fact, the act of defendant in so doing was such an act of gross negligence on its part as should prevent it from asserting such fact as a defense in this case. To hold otherwise would enable the defendant to take ad-

vantage of its own wrong as against an innocent party who parted with her money in reliance upon defendant's written statements.

Defendant's counsel invoke the rule that "where one of two innocent parties must suffer by the fraud of a third party, the loss must fall upon the one who placed it in the power of such third party to commit the fraud;" but this rule, as applied to the facts of this case, works to the advantage of the plaintiff rather than that of the defendant. It is true that the plaintiff, by entrusting her money to Clarence Cochran to be deposited to her credit with the defendant, placed it in his power to deceive the defendant; but this act was not the proximate cause of the loss to either party. The proximate cause of such loss was the act of defendant in issuing its receipts to the plaintiff without qualification and without giving her credit for the same on its books. This was the act which placed it in the power of Clarence Cochran to deceive the plaintiff; and this act was carelessly overlooked or forgotten by the defendant when it permitted Clarence Cochran thereafter to draw out the money so deposited. The rule invoked is often stated as follows: "The rule of law is, where one of two persons must suffer loss, he who by his negligent conduct made it possible for the loss to occur must bear it." (Anderson v. Barne, 71 Ill. 30, 32; Keohane v. Smith, 97 Ill. 156, 159; Miller v. Larned, 103 Ill. 562, 581.) Here it was the negligent conduct of defendant that made it possible for the loss to occur, and therefore, under the rule as thus stated, defendant must bear the loss.

Five propositions of law were submitted to the court, all of which were refused, and it is contended the court erred in refusing such propositions. The first four propositions are abstract propositions of law and might well have been marked, "Held." But there was no error in marking them "Refused," for the reason that none of them has any application to the determin-

ative facts in this case, viz., that defendant received the money in question and gave the plaintiff its receipts therefor, embodying therein an agreement to repay the same to her with interest, and thereafter negligently paid it over to Clarence Cochran without the knowledge or consent of the plaintiff and without the production or cancellation of such receipts. The fifth proposition was properly refused, for the reason that whether the alleged proposition of law therein stated is correct or not, is immaterial under the facts of this case.

For the reasons stated, the judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

205 - 28481

NATIONAL DRUG CLERK, Inc.,
Appellee,

vs.

BIOFOOD, a corporation, sued as BIOFOOD CHEMICAL COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

The plaintiff publishes a trade magazine called "The National Drug Clerk." On September 26, 1921, the defendant, by a written document in the form of a letter addressed to the plaintiff, "authorized" the plaintiff to insert in its magazine an advertisement for twelve months, beginning in November, 1921, for which defendant agreed to pay $18 a month. This document concludes as follows: "This contract cannot be cancelled before its expiration except by the National Drug Clerk, Inc." This was signed by the defendant, and marked "Accepted" by the plaintiff. The defendant submitted an advertisement to the plaintiff which was inserted in the November and December issues of the plaintiff's magazine and paid for by defendant. In December, 1921, defendant sent a letter to the plaintiff asking it to discontinue further advertising, saying it had received no benefit therefrom. The plaintiff refused to accede to this request, claiming that the contract was "noncancellable," except by the plaintiff. Against the protest of defendant, plaintiff published the advertisement in six subsequent issues of its magazine, and then sued defendant for $168, claiming that amount as a balance due for advertising "in accordance with" the contract above mentioned. On a trial before the court without a jury the plaintiff had judgment, from which the defendant appeals.

The finding and judgment are clearly wrong. The contract made by the offer of the defendant and the acceptance thereof by the plaintiff lacks the essential element of mutuality. By its terms, defendant agreed to pay a specified sum for advertising in plaintiff's magazine, but the plaintiff did not agree to do anything. It cannot be held that the acceptance of defendant's offer by the plaintiff implied an agreement on the part of the plaintiff to publish the defendant's advertisement for twelve months or for any other time, for the reason that the contract expressly reserves to the plaintiff the right to cancel the contract at any time. Under that provision the plaintiff could have refused to publish the defendant's advertisement without liability for damages. "A contract which can be terminated at the will of one of the parties without liability for damages, so far as it remains executory, is not binding for want of mutuality." (6 R. C. L. 691.) "Mutuality of obligation is an essential element of every enforceable agreement. Mutuality is absent when one only of the contracting parties is bound to perform." (13 C. J. 351.) "Where one party reserves an absolute right to cancel or terminate the contract at any time, mutuality is absent." (Ibid. 367.) "Where by the terms of the agreement an option is reserved by one party to determine it or to consummate it as a contract, the law will give a like option to the other party, until both parties are bound." (Ibid. 606.) These principles have been recognized and applied in Illinois in the following cases: Young v. Pekoe, 157 Ill. 339; Higbie v. West, 211 Ill. 333; Joliet Bottling Co. v. Joliet Citizens' Brewing Co., 254 Ill. 215.

It is contended by plaintiff's counsel that the publication of the advertisement in the November and December issues of plaintiff's magazine constituted a partial performance of the contract, which, it is said, "renders it a valid and binding

contract" as to the other publications. We cannot so hold. The plaintiff did not thereby become bound to publish such advertisement for the remainder of the year, nor did it by that act, or any other, waive the provision in the contract authorizing the plaintiff to cancel the contract at any time. When, therefore, the defendant notified the plaintiff to discontinue advertising, it had the right to, and did, in effect, cancel the contract so far as the same then remained unperformed. The plaintiff has been paid for what it did before the contract was thus cancelled, and it is not entitled to be paid for anything done by it thereafter.

The judgment of the Municipal Court will be reversed. Upon the authority of Harty Bros. v. Polakow, 237 Ill. 550, 567, the case will not be remanded.

REVERSED.

Gridley, P. J., and Barnes, J., concur.

220 - 28496

PEOPLE OF THE STATE OF ILLINOIS, ex rel. GLADYS FANNIN,
Appellee,

vs.

EDWARD INGRAM,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I.A. 30

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in a bastardy proceeding, wherein, after a full hearing by the court without a jury, the defendant was found guilty. He contends in this court that the finding is contrary to the evidence, that the court erred in refusing to admit the testimony of defendant's wife, and other testimony, offered for the ostensible purpose of showing undue intimacy between the relatrix and persons other than the defendant.

It will serve no useful purpose to recite the evidence in detail. The relatrix testified to facts which, if believed by the court sitting as a jury, fully justified the finding. Her story is neither unreasonable nor improbable, and it is corroborated to some extent by evidence of facts and circumstances amounting to admissions of guilt on the part of defendant. It is true that he denied her story in toto, and denied the alleged admissions and corroborating facts as well. But after a study of the evidence in the light of the contentions of his counsel, we are unable to say that the finding of the trial court is manifestly contrary to the weight of the evidence.

As to the alleged error in refusing to permit the defendant's wife to testify, the record shows that the court

did not hold she was an incompetent witness. The court asked defendant's counsel to state what he expected to prove by her, to which counsel replied that the witness would testify that she had lived in the same house with the relatrix; that relatrix then kept late hours and often "talked about a fellow named Cecil," with whom she had "kept company" in Texas, and who was then in Chicago attending school and living at a Chicago hotel; that relatrix had said she was going to marry him when he finished school, and had been to his room "to see him;" that on one occasion she had been seen sitting on Cecil's lap "in the front room with the lights out;" that she "often had men standing outside of the house waiting for her; that she would meet them and go away and stay until after midnight;" and that she "would stand in front of the house and talk to men late at night before she would come in the house." To this offer, the court said: "Well, we will see what she testifies to." Whereupon the witness was sworn, and was asked to relate the conduct of relatrix "in relation to entertaining men in the living room at night with the lights out." The court interrupted by saying: "That is not material, if that is all she can testify to." We see no error in this ruling. Assuming that the witness would have testified to everything contained in the offer of counsel such evidence would not prove, nor tend to prove, that defendant was not guilty as charged, nor even tend to prove that the relatrix was an unchaste woman.

Defendant's counsel also made an attempt to prove the same facts by asking the relatrix about them on cross examination. She denied them and denies she talked to anyone about the man Cecil. After the questions were answered, the court, on motion of the plaintiff's attorney, struck out all that part of her testimony regarding other men, giving as its reason for the ruling that all evidence of acts occurring prior to the alleged acts of intercourse between the relatrix and the defendant was immaterial.

Whether the court's reason for this ruling was correct or not is of no consequence, for the reason that the only use defendant's counsel could have made of the stricken testimony of the relatrix was to use it as a basis for impeaching the relatrix, and this the defendant's counsel attempted to do by calling a witness who, when sworn, denied everything that defendant's counsel claimed she had said or had seen. Hence defendant was not injured by the court's ruling, in any event.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

229 - 38505

J. M. KERSTEIN,
Appellee,

vs.

SCOVILL MANUFACTURING COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 601

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Upon a complaint stating that defendant was unlawfully withholding from the plaintiff the possession of the third floor of a building in Chicago, there was a jury trial in the Municipal Court, at the close of which the court directed a verdict for the plaintiff. Judgment for possession was entered, and this appeal followed.

The building in question has four floors and a basement. In 1921, defendant, a manufacturer of brass goods, occupied the first floor and basement, and the upper three floors were occupied by Kennsbey & Mattisen Co., all under leases which expired May 1, 1922. On September 9, 1921, the owner gave defendant a new lease of the first floor and basement for five years beginning May 1, 1922. This lease recited that defendant had theretofore installed for its own use an electric elevator from the first floor to the basement, which, it was agreed, defendant "may continue to operate at its own expense." On December 9, 1921, the owner also gave defendant a lease of the second floor for five years beginning May 1, 1922. This lease contained a provision that defendant "is to extend the electric elevator to the second floor" at its own expense, with iron doors "for all openings from the basement to, and including, the second floor." With this lease the owner sent to the defendant a letter inclosing his check for $1,000.

which, the letter stated, the owner was "allowing for the expense in connection with carrying the elevator from the first to the second floor."

On February 24, 1922, the owner of the building executed a lease to the plaintiff for the third and fourth floors for five years beginning May 1, 1922.

In March, 1922, defendant reconstructed its elevator so as to run from the basement to the second floor. In doing this, it entered upon the third floor without the knowledge of the owner, but with the permission of the Keasbey & Mattison Co., the tenant then in possession thereof, cut a hole in the floor, placed the elevator sheaves therein, and covered them with a box 4½ feet high, 4 feet wide, and 12 feet long. When the plaintiff learned of this, he asked defendant's agent "how he happened to put that" in the third floor. The agent replied that the owner had given permission to do so. The plaintiff then went to the owner, who denied he had given such permission. This suit was brought August 8, 1922.

There was no proof of any demand by plaintiff upon defendant for possession of the premises in controversy, and defendant contends that the failure to make such proof is fatal to the judgment. The argument on this point assumes that the action is brought under the second clause of section 2 of the Forcible Detainer Act, which covers cases where a peaceable entry is made and possession thereafter unlawfully withheld. It is true that the entry in this case was peaceable; but the permission to make such entry was given by a tenant whose lease expired when that of the plaintiff began. Any right that defendant had to occupy any part of the third floor by virtue of such permission was necessarily limited by the right of the tenant of that floor to permit such occupation, and therefore such right expired when the lease of the Keasbey & Mattison company expired. Defendant's occupation of the third floor thereafter had the same legal status as if the Keasbey & Mattison company

[illegible] the [illegible] [illegible] [illegible]

had itself remained in possession of the third floor after its lease had expired. The fourth clause of section 2 of the Forcible detainer Act covers cases "when any lessee of lands or tenements, or any person holding under him, holds possession without right after the determination of the lease or tenancy by its own limitation, condition or terms." This is one of such cases, and no demand for possession was necessary before bringing suit. (Condon v. Brockway, 157 Ill. 90.)

On the merits, defendant's counsel claim that the evidence shows that the owner, in his lease of the second floor to defendant, gave permission to extend the elevator upward a sufficient distance to enable the defendant to use the elevator in connection with its business on the second floor, and defendant contends that this could only be done by placing the elevator sheaves on the third floor. In other words defendant's theory is that the granting of authority by the owner to so extend the elevator upward necessarily implied the right to use so much of the third floor as might be required to make such grant effective. The record shows that upon this theory defendant offered to prove by two experts in the construction of elevators that it was necessary to construct the elevator in the manner it was constructed, because of the provisions of an ordinance of the city of Chicago requiring a clearance of 4 feet between the bottom of the sheaves and the top of the car. There is no evidence, in the record, however, showing the height of the second floor, or the size or the height of the elevator car. For aught that appears in the record, there may have been sufficient room below the ceiling of the second floor to have permitted a construction in compliance with the ordinance without extending the elevator shaft upward into the third floor. The questions asked of the experts merely sought their opinions as to whether any other construction would have constituted a violation of the ordinance. There was no error

in sustaining objections to these questions, for the reason that the answers of the witnesses, if permitted, could only have been expressions of opinion upon facts not shown by the evidence, and there was no offer to prove such facts.

Defendant further contends that a question of title was involved, and that as soon as that fact was apparent the cause should have been dismissed. We think there is no merit in this contention. No question of title was involved. Only the right to possession of the third floor was involved. Both parties claimed their right to possession by leases from the same owner. The plaintiff's lease unequivocally gave the plaintiff the right to occupy the whole of the third floor after May 1, 1928. There is nothing in the defendant's leases that gave defendant any right to occupy any part of the third floor, unless such right can be implied from the language of defendant's lease of the second floor; and there is no evidence of any facts or circumstances from which such a right can be implied. Upon the facts shown, the defendant in its occupancy of any part of the third floor was merely an intruder, without any right or title whatever.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

239 - 28515

JOHN C. HATTENDORF,
Appellant,

vs.

SOPHUS FRED WESTPHALEN,
Appellee.

APPEAL FROM
CIRCUIT COURT OF
COOK COUNTY.

231 I.A. 304

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

On December 31, 1921, a judgment by confession against the defendant was entered upon a judgment note for $5,500, dated July 22, 1921, signed by the defendant, and payable to the order of the plaintiff in ten days after its date without interest. In November, 1922, on defendant's motion, the judgment was opened and a trial had, with the affidavit which defendant had filed in support of his motion standing as an affidavit of merits. The jury found the issues for the defendant, and from a judgment entered thereon the plaintiff appeals.

The parties first met in a bank in Chicago on July 22, 1921. They were introduced by the cashier of the bank. The plaintiff said he had 200 shares of stock, worth $16 a share, which he offered to sell to defendant for $11.50 a share. The defendant said he would buy if he could raise the money, and thought he could raise it in about ten days. Plaintiff suggested that defendant sign a note for the amount, due in ten days without interest, and leave it with the bank, saying that he, the plaintiff, would have a certificate issued for the stock and that both the note and the stock certificate should be held by the president of the bank until the note was paid. Thereupon defendant signed the judgment note in question and left it with the president of the bank. The plaintiff testified that a day or two later he delivered to the bank's cashier a stock certifi-

cate for the 200 shares, made out in the name of the defendant. This was corroborated by the cashier, who testified that he turned over the certificate to the bank's president. The defendant testified that about August 4, 1921, he told the plaintiff he could not possibly raise the money, and that plaintiff replied "that was all right" and that he "would hold it" for another thirty days; that at the end of that time defendant again met the plaintiff in the same bank and told the plaintiff "he was up against it" and could not raise the money "for the stock," and asked the plaintiff "to kindly cancel the note and forget about it;" that plaintiff acquiesced in this, telling defendant "not to worry," and that he, plaintiff, "would keep the stock." The defendant's story in this respect is fully corroborated by the testimony of the cashier. The defendant further testified that he never saw the stock certificate at any time. The plaintiff testified that he never saw the stock certificate after he delivered it to the bank. The judgment note, however, was evidently turned over to the plaintiff, for he had judgment entered upon it in December, 1921, as above stated.

It is contended by counsel for the plaintiff that the verdict is clearly contrary to the weight of the evidence. We have carefully examined the abstract of the evidence and have carefully considered counsel's argument upon the same, and we are unable to say that the verdict is manifestly contrary to the preponderance of the evidence. The only real dispute between the parties is whether the plaintiff agreed to keep the stock and cancel the note. The plaintiff denies that he ever so agreed, but the cashier, who appears to be a disinterested witness, and who was in no way impeached, corroborates the defendant in this particular. Plaintiff's counsel insist that the evidence shows a sale and delivery of the stock and that the title to the same passed to defendant. The president of the bank testified that

it was agreed that the note and stock were to be left with him "until the note was paid," when the stock was to be delivered to defendant. Such a delivery of the stock certificate to the bank's president was in the nature of a delivery in escrow, and as the condition was never performed, the title did not pass. As the stock was never thereafter delivered or tendered to the defendant, the plaintiff acquired no title to the note when it was turned over to him, apparently in violation of the agreement.

Complaint is made of an alleged error of the court in refusing to permit the plaintiff to testify to the contents of a letter. The letter was one which should have been in the possession of the defendant, and no notice was served on him or his counsel to produce the same. The record shows that this was the reason the court refused to permit plaintiff to testify to its contents, and there was no error in the ruling.

There was some testimony regarding an alleged offer made by the plaintiff "to settle for $2,000." This was improperly admitted, but was stricken out, on plaintiff's motion, when its improper character became apparent. Furthermore, the alleged offer, if made, was not of such a character as would be likely to prejudice the plaintiff's case in the minds of any sensible jury. Counsel makes this ruling and the remarks made by the court regarding the same and other rulings the basis for a somewhat bitter criticism of the alleged unfriendly attitude of the trial judge. We have examined the record and fail to see anything in it to justify such criticism.

It is also urged that one of the instructions was erroneous. It told the jury that if they believed from the evidence that the certificate of stock had never been tendered to the defendant, the jury "should" take that fact into consideration

in determining whether there was an agreement to retain the stock and cancel the note. The instruction is open to criticism in using the word "should" instead of the word "may," and in singling out a particular fact and giving it undue prominence. By another instruction, however, given at the request of the plaintiff, the court instructed the jury that the burden of proving any such agreement was upon the defendant, that he must prove it by the greater weight of the evidence, and that if the evidence on this point was equally balanced, or preponderated in favor of the plaintiff, the jury must find for the plaintiff on that issue. While we agree with the plaintiff's counsel that the instruction criticised should not have been given without modification, we think that under the facts of this case, the error in giving it is not sufficient of itself to warrant a reversal of the judgment.

It is finally contended that the court erred in giving an oral instruction. The alleged oral instruction told the jury that the remarks of counsel or of the court were not evidence. This was given after the arguments, and the arguments are not in the record. The oral direction of the court can hardly be considered an instruction. It hasbeen held that oral directions given by the court as to the form of a verdict need not be in writing. (I.C.R.R.R. Co. v. Wheeler, 149 Ill. 585; Conness v. I. I. & I. R. R. Co., 193 Ill. 464.) During the trial of a case before a jury it frequently becomes the duty of the trial judge to direct the jury to disregard statements of counsel and answers of witnesses that have been improperly or inadvertently made; and such directions are not instructions within the meaning of the statute requiring instructions to be given in writing. (2 Thompson on Trials, sec. 2360; Hayes v. Kramer, 220 Ill. 256, 261.)

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

13 - 27547

NETTIE ROOM,

Plaintiff in Error,

v.

THE SALVATION ARMY, a corporation, EDITH DENNES, JOHN ADDIE, JOHN D. SHARP and MRS. JOHN D. SHARP,

Defendants in Error.

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

231 I.A. 305

Opinion filed October 17,1923.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Nettie Room, brought suit against the Salvation Army and four other defendants for slander. There was a trial before the court with a jury and, at the close of plaintiff's evidence, upon defendants' motion, a directed verdict and judgment for the defendants. The cause comes before us upon a writ of error prosecuted by the plaintiff.

The declaration consists of two counts. The first charges that whereas the plaintiff was a person of good name, the defendants, conspiring and contriving with malice, on or about June 16, 1917, and at times prior and subsequent thereto in certain talks concerning the plaintiff, in the presence of others, falsely uttered, concerning her, the words, "She (meaning the plaintiff) had collected $10.00 for the Salvation Army and failed to account for it"; (meaning and intending to charge that she had stolen feloniously $10.00 belonging to the Salvation Army); that the Salvation Army is a corporation, and that Dennes, Addie and Mr. and Mrs. John D. Sharp were officers and agents of the Salvation Army at the time they spoke the words

Opinion filed October 17, 1938.

and were then acting in such capacity and in their line of duty. The second count charges substantially the same matters as the first, save that the defamatory words set forth are as follows; "She (meaning the plaintiff) failed to account for and turn over $17.00 she collected for The Salvation Army." The ad damnum is $50,000.00.

The defendants, The Salvation Army, Edith Bennes and John Addie, the only defendants served, filed a plea of the general issue. The Salvation Army filed, also, a plea alleging that it is a corporation organized not for pecuniary profit; that it is organized for charitable, educational and religious work; that, although entitled to receive and hold both real and personal property and to execute trusts thereof, and to transact and carry on any work or operations in connection with its general purposes, and to enter into contracts of every kind for any lawful purpose, and to issue bonds and secure them by mortgage, it is not a corporation for pecuniary profit, but was organized for purely charitable purposes. The plaintiff filed a replication to the latter plea, and upon a demurrer thereto being sustained, filed an amended replication which charged that The Salvation Army was a corporation organized for pecuniary profit; that it permits its officers and agents to collect large sums of money in this and other states which it caused to be distributed as profits among its officers and agents.

At the trial the plaintiff testified, and there was then read in evidence the depositions of four different witnesses. As there was a directed verdict at the close of the plaintiff's case, there was no evidence offered by the defend-

ents. It is contended for the plaintiff that she did not have a fair trial; that the trial judge was of the opinion that an action would not lie for words spoken in the state of Missouri; that he erred in ruling on certain matters of evidence, and that there was ample evidence to justify submitting the case to the jury.

The plaintiff became a member of The Salvation Army when she was fourteen years old, and worked for it, almost continuously, for over 30 years. She began as a slum officer, nursing, scrubbing and washing for the poor in Chicago. She meanwhile, also, collected funds and turned them over to her superior officer. She worked in Chicago eight or nine months. She was paid fifty cents a week and got food and quarters from The Salvation Army.

From Chicago she went to New York City and then Brooklyn, and did similar work for similar wages. Subsequently she worked in Philadelphia. After a respite of three months, owing to ill health, she began her work again in Chicago. She was then designated captain. That was done in accordance with the rule of the defendant that those who devote their lives to its work are designated cadet, lieutenant, captain, ensign, adjutant, staff captain, etc. according to their rank. She remained in Chicago, the second time, about a year and a half, and then went to Providence, where her duties were the same as before. Her peregrinations were always dictated by some superior officer. She worked subsequently in Minneapolis after being home sometime on account of the illness of her mother, and then went to Kansas City, and then again to Minneapolis. She was then getting five dollars a week. There having arisen some dispute about her temporary field appoint-

ment, she went to St. Paul under Colonel Marshall. Her wages there were supposed to be eight dollars a week above expenses, but that depended upon the receipts. From there she went to St. Louis where she worked under Commander Estill who was in charge of slum work. There, some difficulty arose out of the matters involved in the subject of the alleged slander, and she was given a furlough, in the hope that the matter would quiet down. But, it got worse. In 1916 she was sent by Colonel John Sharp (a defendant who was not served) to El Dorado, Illinois. When she was asked, what were his duties in The Salvation Army at that time, it was objected to on the ground that it was immaterial, and the objection sustained, the trial judge stating, "It is immaterial what his duties were, he is not a defendant here." There then occurred a long discussion between court and counsel, and, apparently, the court being of the opinion that it did not matter what Sharp said, and as his function as an officer was not detailed in the declaration, the question was ruled out. That was substantial error. The plaintiff had made Sharp a defendant - though that was unnecessary - and had charged that The Salvation Army had slandered her. She charged that Sharp and others at the time the words were used were officers and agents of the defendant and "were acting in such capacity in line with their duty." So it became entirely proper to prove Sharp's duties as an officer of the defendant. There is nothing to the contrary in Arnkow v. Metropolitan Life Ins. Co., 218 Ill. App. 535, or in International Text Book Co. v. Hearth, 136 Fed. 129. As to the argument that, even admitting he was an officer, what he might have said, was immaterial, it is sufficient to say that the overt acts of a corporation are practically always accomplished through the conduct of the agents and officers, and, so, it might well be that what he said would bind the defendant, and hence was competent.

In the course of her examination she was asked a number of other questions as to conversations with Sharp, many of which were ruled out that ought to have been allowed to be answered. The plaintiff testified, further, that in 1916-1917 she was engaged with The Salvation Army; that they - apparently the officers - were holding her over for an appointment, awaiting the outcome of the accusation that had been made against her; that they kept her over a year without an appointment and finally asked her to resign; that she refused and they wrote back and said that Commissioner Estill, her superior officer, had dismissed her as a Salvation Army Officer; that in 1916 she was in charge of the funds which she collected and did not turn them over to anybody; that Sharp summoned her to St. Louis. An objection was made to any conversation with Sharp, and the trial judge sustained the objection. The only ground for the objection, as it was stated by counsel, was that there was no allegation in the declaration to justify it. The ruling was erroneous, as it was not necessary that it should be alleged in the declaration.

She further testified that Sharp was in charge of the division of which she was an officer; that he was in charge of the work and all persons had to account to him; that she had to account to him for her actsand doings. That was objected to and the objection sustained. That was error. It should have been allowed to stand, although it became, at least in part, innocuous, as she was then asked to whom she had to account, and answered, "I had to account to Sharp in 1916-1917." Following that she stated that she had a conversation with Sharp in reference to her doings. An objection was made on the ground that there was no allegation in the declaration that would justify it and it was ruled out. That was error.

She further testified that in 1916-1917 Sharp was her superior officer; that she had a conversation with him in the presence of Ensign Bennett, Ensign Bowman and Mrs. Sharp; that the last conversation with him was in June 1917; that Sharp said that she had collected ten dollars and had left the stub of the receipt she gave for the ten dollars in the book, "but there was no receipt; that I had taken the ten dollars and used it for my own personal use." It was then moved by counsel for the defendant that that testimony be stricken out as it varied from the allegations of the declaration and was immaterial, and the trial judge as a result of that motion, said, "The court will instruct the jury that the testimony, in so far as it has gone now, can have no effect upon the defendants in this case. It might upon Sharp, if he was a defendant, but he is not a defendant." The plaintiff then said that the conversation she had related took place in June 1916, and counsel for the plaintiff moved that it be stricken out as what might have been said at that time was outlawed by the Statute of Limitations, but the trial judge seems then to have admitted it, for he said, "It may go for what it is worth." Of course that ruling was inconsistent, and, if the case had ultimately been left to the jury, it would have produced obvious confusion. The witness then further testified that she saw Sharp several months afterwards, but could not say exactly the date, although it was in April or May, 1917; that she met him on the street and he had someone else with him. At that juncture, counsel for the defendant objected, and the trial judge said, "How could this court take jurisdiction of a slander occurring in St. Louis, Missouri", and then reserved ruling on the objection. The plaintiff was then permitted to continue, and testified that Sharp in 1917, said he was of the same opinion that

he was when he talked to her about the money in June, 1916; that he said she had taken the ten dollars and failed to account for it and had used it for her own personal use. She further testified that she had a conversation with Colonel Gauntlett and Commissioner Estill, to whom the question whether she had been guilty of theft or not, was left; that they told her she was guilty; that she told Colonel Gauntlett if she had an opportunity she could prove her innocence; that he said, "I doubt it very much"; that she had been summoned to headquarters; that Commissioner Finn and Colonel Gauntlett were there; that she first talked with Commissioner Estill in an adjoining room; that at the headquarters Colonel Gauntlett asked her if she would be willing to bring the matter to a close; that she said she would if he would write to Grand Master McPhail in Eldorado that Colonel Sharp wrote to him charging her with theft; that he promised to do so but failed; that she told Colonel Gauntlett that if he would give her an opportunity to get certain people together she could prove her innocence; that he said, he doubted it very much; that as a result of the trouble she was discharged in the latter part of August or early in September, 1917, as an officer of The Salvation Army; that she helped collect part of the fund over which Sharp had control, and about which he uttered the words in question.

On cross-examination, she testified that she started the suit to vindicate herself; that she was charged with theft; that Commissioner Estill sent for her, and Sharp stated the case to him and so she had to talk and told them what the situation was; that she said she thought Sharp was unjust. One Sadie Nemack, by deposition stated that she knew of Sharp as a leader of The Salvation Army; that she remembered that a representative,

Ensign Bennett, in June, 1917, came to Eldorado to examine the book which the plaintiff had charge of; that she, the witness, asked that the plaintiff, as the Corps at Eldorado was in debt, be allowed to stay for two months, but that the representative, in the presence of two Laughlands, Ensign Boom, McPhail and Mrs. Reed and William Taylor, said she had a charge against her and that it was not the first one and that it pertained to money matters.

Two depositions, one of Margaret Laughland and one of James Laughland, were offered in evidence, but as they testified that what they heard Sharp say occurred in 1916, their evidence was ruled out as being obnoxious to the Statute of Limitations. As, however, the only pleas were of the general issue and that The Salvation Army was a charitable corporation, their evidence as to what he said should have been admitted.

From the foregoing it seems but reasonable to conclude that the plaintiff did not have a fair trial. The declaration sufficiently stated a cause of action, and considerable evidence that was ruled out, as above stated, should have been admitted. Where a trial judge shows that he has an erroneous conception of the law of a case which he tries, and rules on evidence in accordance with such erroneous conception, and by reason of his error, seriously hampers counsel in the introduction of competent evidence, and the proper presentation of his case, and at the close of the plaintiff's case, directs a verdict of not guilty, there may be a sufficient miscarriage of justice to justify ordering a new trial. A careful analysis of the proceedings in this cause, bearing in mind meanwhile what a fair trial is, the meticulous and logical care which our jurisprudence patriotically

commands shall ever be exercised by the trial judge in directing and controlling the conduct of a cause before him, leads to the conclusion that in the interest of justice the judgment must be reversed and the plaintiff given a full, legal opportunity to try out her case. Being of the opinion, as said above, that the declaration stated a cause of action, and that the plaintiff did not have a fair trial we do not deem it necessary, here, to pass upon all the questions discussed, by counsel for the defendants in their brief.

It is contended on behalf of the defendant that the alleged slanderous words did not justify the innuendo that the plaintiff was charged with the crime of embezzlement or with any crime. It is our opinion that that contention is untenable.

It is contended on behalf of the Salvation Army that as it pleaded it was a charitable corporation and not conducted for pecuniary profit and as the plaintiff by an amended replication denied that allegation and alleged that it was a corporation organized for pecuniary profit and, yet, offered no evidence in support of her contention, that no liability on the part of the defendant was proven. In our judgment, inasmuch as the defendant, The Salvation Army, admitted in its pleading that it is a corporation, the burden then was upon it to show that it is a charitable corporation and does not rest upon the plaintiff to show the contrary. In Parks v. Northwestern University, 218 Ill. 381, whether the defense should be raised by demurrer or plea was waived and by agreement the charter of the university was produced and an issue of law made thereon.

Counsel further suggest that we should take judicial

notice that it is a public charity. That, however, we are not entitled to do.

As to the matter of variance and the Statute of Limitations, it is sufficient to say that the former was not claimed and the latter was not pleaded.

The judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

27814
62 - 27824

(3372)

MAX RATTNER,

Appellee,

v.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, a corp.,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

231[illegible]

Opinion filed Oct. 17, 1923.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Max Rattner, having been injured on October 28, 1919, by a truck belonging to the defendant, the International Harvester Co., on South Halsted Street, near West Congress Street, brought suit against the defendant on December 31, 1919, and upon the cause being tried before the court, with a jury, there was a verdict finding the defendant not guilty. At that trial, on November 8, 1921, after the jury had retired to consider the evidence, and before they had brought in a verdict, and while counsel for both parties were still in court, and court was in session, and "in the presence and hearing of the court, it was agreed between counsel that a sealed verdict might be returned; that the polling of the jury should be waived, and that a motion for a new trial should be entered on behalf of the losing party and set down for argument on Saturday morning, November 12, 1921; and the court then and there expressly stated that said motion would be argued on said day, unless the verdict should be against the plaintiff and counsel for plaintiff should not then and there be ready to argue said motion, in which case the court stated counsel for plaintiff should have

Opinion filed Oct. 17, 1955.

further time."

Thereafter, on the same day, the jury returned a verdict finding the defendant not guilty, and thereupon, "the court immediately and before the jury had been excused from the case, and in the presence of the jury, and in the absence of counsel, entered a motion on behalf of the plaintiff to set aside the verdict and for a new trial, and without argument, or the opportunity to be heard by counsel, immediately sustained said motion and set aside said verdict and ordered said case to be reassigned on the calendar for another trial." The record then shows the following: "To which action of the court in setting aside said verdict and granting a new trial * * * the defendant then and there duly excepted."

Subsequently, on November 12, 1931, defendant's counsel moved, in writing, to set aside and vacate said order setting aside said verdict and granting a new trial, and to set down the motion for a new trial for argument. That motion was overruled and the ruling excepted to.

There was a second trial, and on April 27, 1932, a verdict was returned finding the defendant guilty and assessing the plaintiff's damages at the sum of $3,000.00. Motions for a new trial and in arrest of judgment were made and overruled and judgment entered on the verdict. This appeal is therefrom.

It is claimed for the defendant, first, that the trial judge, in setting aside the verdict in the first trial in the absence of counsel and in the face of the agreement made in open court that the motion for a new trial should be set down for argument on Saturday, November 12, 1931, committed

Carolyn Blum,

such error that the present judgment should be reversed with directions to the Superior Court to reinstate the first verdict and enter judgment thereon; and, it is claimed, second, that the present judgment should be reversed on the ground that, as a matter of law, the plaintiff's own negligence caused or contributed to his injury. The two contentions will be considered in their inverse order.

As to the charge that the plaintiff was guilty of contributory negligence. On October 29, 1919, the plaintiff, a man about thirty three years old, a jeweler by profession, a resident of Davenport, Iowa, came to Chicago on business. He had occasion to go to 14th and South Halsted streets, and to get there took an elevated train to the station which is on the west side of Halsted Street, about 150 feet north of West Congress Street. From that point, he took a southbound Halsted Street car to 14th street. Having transacted certain business, he then, between 2 and 3 P.M., took a northbound Halsted Street car, to return to the same elevated station to take another train.

He asked the conductor of the street car to let him off at the elevated station. The stopping place for northbound cars for the elevated station was at the south line of Tilden Street. That street runs east and west, but stops at the west side of Halsted street, and does not go through. Halsted street runs north and south, and the elevated station is on the west side of Halsted street, about opposite the west end of Tilden street. The street car on which the plaintiff was riding stopped at Tilden street and he and some other passengers got off. He stood there with some other people, and the street car started north. On the

south line of Tilden Street extended, there is a crosswalk running east and west across Halsted Street. After the street car had gone north from five to twelve feet, the plaintiff started west across Halsted Street, south of the crosswalk of Tilden Street extended. He was carrying two boxes, one a small one, and one about eighteen inches square. The small one he held with one of his arms, and the large one he carried by a string in one of his hands. Halsted Street is a closely built up street, and at the time in question was congested with traffic. A number of the passengers, who had gotten off, started across the street ahead of the plaintiff. He followed them but when he reached the five foot strip between the two street car tracks, the traffic was such that he was cut off from them by passing vehicles. As he stood within the area between the north and south bound tracks, he looked north to see if anything was coming towards him and then looked south, and then looked north and, according to his testimony, the defendant's truck was right on him. When he first looked north the truck was under the elevated. He testified on cross-examination that he did not exactly see the truck come out from the line of traffic - meaning from the space between the tracks and the curb on to the tracks - but when he looked back north, that is, the second time, it was within probably five or six feet of him; that he could not step back for if he had, he would have been killed by the traffic going north, some of which vehicles were over the track just behind him.

One Ottenheimer testified that the plaintiff got in between the two tracks, within a foot or two of the east rail of the southbound tracks and that the truck came out from behind theline of other trucks and racous and struck him; that the

truck turned out from behind the other vehicles when it was about twenty feet north of where the plaintiff was standing; that he could not go backwards or forwards; that the east front wheel struck and knocked him down and he fell in the space between the tracks. One Aliotta testified that it was his impression that the truck passed some other traffic, shot by, and was in the street car tracks when it struck him. One Perlmuhner testified that the street car was probably a half a block north when the plaintiff got across the northbound track; that the plaintiff got as far as the east rail of the southbound track; that some of the southbound vehicles went entirely out of the truck because a southbound street car back of them was ringing for them to get out; that some of them had one wheel in the track and one out; that the defendant's truck went out from the line of traffic and got back into the track, tried to get around the rest of them; that the driver of the truck pulled out "pretty lively", going from 14 to 17 miles an hour; that he pulled out quickly from the side, to get around the rest of the traffic. On cross examination he testified that the truck was several wagon lengths north of the place of the collision when it turned out; that then it came down right in the track till it struck the plaintiff; that the plaintiff was then just about on the east rail of the southbound track; that the plaintiff saw that the truck was on top of him and attempted to back up but could not as there was other traffic going north in the northbound tracks that would have hit him.

One Feints testified that when he first saw the truck it was over considerable of the southbound track or almost to the northbound track; that the wheels on the left side of the truck were in between the tracks or on the northbound track.

The only occurrence witness called by the defendant was one Schmidt, the driver of the truck. He testified that he had been driving motor cars for about fifteen years; that the machine was a one ton truck; that at the time in question the traffic was very congested and he was following, driving in the southbound tracks; that he did not pull out of the line of traffic just before the collision. On cross examination he testified that when the front end of his truck was past the rear end of the street car the plaintiff came out on a run; that he was not struck by the truck but slid under it; that he was more than three feet back of the hood of the truck - which hood is three feet back of the front of the truck - that he , the plaintiff, was about five feet from thefront end of the truck. On redirect examination, he stated that, as far as he could see, the truck did not touch him. He further testified that the plaintiff was coming so fast that in trying to stop himself, he came to a sitting position and put one foot under the rear wheel. The wheels of the truck had mud guards over them, about twelve inches wide, extending out about three inches beyond the hubs of the wheels.

Ottenheimer put the speed of the truck at 16 to 30 miles an hour; Perbohner, at 14 or 15, perhaps 17; Aliotta, at 18 to 20; and Schmidt at 8 to 10 miles an hour.

The plaintiff suffered a compound fracture of the tibia of the right leg. There was an operation, and a plaster cast applied. There was a union of the broken bone, but, in the opinion of the surgeon who attended him, the leg will continue to be painful. The fees of the doctor were $300.00 and were paid. From the evidence, it is shown that if the story of the driver is

the broken

true, the plaintiff was guilty of contributory negligence, but if the facts related by the plaintiff, Aliotta, Ottenheimer and Perbohner are true, then the verdict of the jury should stand. Between the testimony of the driver and that of the three occurrence witnesses there is a direct conflict as to the position and conduct of the plaintiff, the motions and place of the truck, its speed and the position of the street car. Evidently the jury did not believe the driver, but did believe the plaintiff and his witnesses.

Under these circumstances the question arises whether there should have been a directed verdict for the defendant upon the ground that, as a matter of law, the plaintiff was guilty of contributory negligence. There is evidence that the truck was driven from the area between the southbound tracks and the curb over on to those tracks, and then somewhat beyond. Although the testimony of Weintz is somewhat ambiguous, he does state that when he first saw the truck it was over considerable of the southbound track or almost to the northbound track, that the wheels on the left side of the truck were in between the tracks or on the northbound track. And, according to the plaintiff, some of the northbound traffic was west of, that is, about over the northbound tracks. The truck was going, according to the average of the plaintiff's witnesses, between 17 and 18 miles an hour, and gave out no warning signal. The evidence for the plaintiff shows that the driver undertook to get ahead of certain traffic in front of him, on a congested street, in a closely built up neighborhood, and at the same time that the street car had just stopped at a customary place to take on or let off passengers or both. The plaintiff went behind the car - as did a number of others -

to cross the street the nearest way to the elevated. That he had a right to do providing he was appropriately careful. Stack v. East St. Louis Ry. 245 Ill. 308; Loftus v. Chicago Railways Co., 293 Ill. 475. He looked both ways, north and south, and, apparently did those things that a prudent man would do for his safety. He was not bound to assume that at that time a truck would come along at such a speed in such a place, and without a warning signal, and encroach even on the space between the two tracks. Contributory negligence does not arise from a failure to anticipate negligence in others. Bukeman v. C. C. C. & St. L. R. R. Co., 237 Ill. 104.

Although there is some force in the argument of counsel for the defendant, and although the case is not free from difficulty, we are constrained, after a careful analysis of the evidence, to conclude that it was properly submitted to the jury, and that we are not entitled to conclude that, as a matter of law, there should have been a directed verdict for the defendant.

As to the claim by the defendant, that the trial judge erred in violating an agreement to set down the motion for a new trial for argument: As counsel for the defendant did appear in court on Saturday, November 12, 1932, and make a motion to set aside the order granting a new trial, and as, we may assume, the question as to whether a new trial should have been allowed was considered, we feel bound to conclude that the trial judge was still of the opinion that the motion should be allowed. And, such being the case,

and as the granting of a motion for a new trial may not be appealed from - Beaver v. Crocker, 48 Ill. 461 - the contention of defendant's counsel is untenable.

The judgment, therefore, will be affirmed.

AFFIRMED.

O'CONNOR, J. and THOMSON, J. CONCUR.

90 - 27922

(337 3a)

HANNAH LEVANDER,

Plaintiff in Error,

v.

CHICAGO RAILWAYS COMPANY and CHICAGO CITY RAILWAY COMPANY,

Defendants in Error.

ERROR TO

CIRCUIT COURT

COOK COUNTY.

231 I.A. 305

Opinion filed Oct. 17, 1933.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff brought suit for damages for injuries which she claimed were caused while boarding a street car of the defendants. A judgment for the plaintiff in a former trial was affirmed by this court. (Gen. No. 26015) but reversed by the Supreme Court on the ground of error in the instructions. Levander v. Chicago City Railway Co., 306 Ill. 384. There was a second trial and a verdict and judgment for the defendants. This writ of error is to reverse that judgment.

As stated by counsel for the plaintiff, the evidence of the facts relating to the cause of the alleged injuries was substantially the same on the second trial as on the first, and the statement of the facts by the Supreme Court, in its opinion is sufficient for the purposes of this writ of error. That statement is as follows:

> "Defendant in error brought an action in tort against plaintiffs in error, the Chicago City Railway Company and the Chicago Railways Company in the Circuit Court of Cook County, to recover damages for injuries allegedto have been received on June 25, 1918, by reason of a fall which she received while attempting to board a street car at the intersection of Paulina and West Madison streets in the city of Chicago. The declaration consists of two counts. The first count, after alleging the ownership and operation of the street

[illegible]

[illegible]

[illegible]

car had stopped at the intersection of said streets for the reception of passengers, and while plaintiff was endeavoring to board the car as a passenger, using ordinary care for her own safety, the defendants by their employees, negligently caused the street car to be suddenly and violently started, and thereby she was thrown to the street and injured. The second count is similar to the first, except that it charges that while the car was stopped and the plaintiff was in the act of boarding the car, using ordinary care for her own safety, the defendants failed to afford her a reasonable opportunity, and by reason of their negligence, in the operation of the car the plaintiff was thrown to the street and injured. The plaintiffs in error filed a plea of the general issue. The case was tried before a jury, which returned a verdict for the plaintiff for $2,000.00.

The plaintiff's evidence showed that she, a woman of about the age of fifty years, on the evening of the accident had attended church, and on her return homeward, about 10;30 P.M., she stepped at Paulina and West Madison streets, for the purpose of taking a northbound street car; that when she reached the intersection she crossed first to the southwest corner, and seeing a northbound car she proceeded to cross Paulina street, on which street the car was being operated, in order to board the same. In doing so, she passed to the rear of the northbound car. Her evidence tends to establish that she passed around the rear of the car to the east side of the rear platform and to the center of the entrance, where she waited for five people who were in front of her to get on, that four of them boarded the car and the fifth stepped to the right and assisted her on to the step; that she took hold of the right hand bar with her right hand and placed her right foot on the step and her left foot on the platform, and that as she was in the act of pulling herself into the car it started with a jerk, throwing her onto the street. There is other testimony tending to corroborate her. Defendants' theory is that the car remained standing until everyone who was waiting had boarded the car; that the conductor looked out and saw that no one else was attempting to get on the step, whereupon he signalled and the car started slowly and smoothly; that the plaintiff was still coming around the rear of the car and had not gotten around to the step, when the car started to move away, and she hastened and reached for the rear hand bar and that when she got hold of it, she fell."

The injuries suffered by the plaintiff consisted of shock, a swelling of the right shoulder, elbow and forearm, a dislocation of two fingers on the right hand and a bruising of her side, hip and thigh. The doctor who attended her testified that a certain looseness and immovability of the right shoulder was a permanent injury.

It is contended for the plaintiff that the trial judge erred in giving certain instructions, numbered 11, 13, and 17;

and as to certain rulings upon evidence.

(1) As to the instructions. Instruction numbered 11, which was given at the defendants request, is as follows:

> "The court instructs the jury that the defendant companies were not required to assume when the plaintiff was on the street, on which the defendants were running their car, that she was going to attempt to enter the said car while it was in motion, if it was in motion, nor did the law require the defendant to hold their car at a stop or to stop it lest she might do so. And if the defendants by their servant or servants, exercised that degree of care required of them as stated in these instructions to do what it could do to avoid injuring the plaintiff after it was possible for the said defendants by the exercise of the said degree of care to know of her danger, if any, then the defendants are not liable."

Plainly, that had reference to the time when the plaintiff was on the street and had actually done nothing that constituted attempting to get on a street car; and whether or not at that time, mentally, she had concluded to attempt to board the car, was of no import to the conductor or motorman, as they are only bound to draw conclusions from those overt acts of prospective passengers which lead at once to getting or attempting to get on. As the Supreme Court said in its opinion, Lavender v. Chicago City Railway Co., (supra), "If she was not in the act of boarding the car but was approaching it for that purpose when the car started she was not a passenger, and the sudden starting of the car, if it was so started, would not be negligence as to her." So, that, even if the defendants' agents might have concluded from the fact that she was approaching the car, that her purpose was to get on, even though it had started, she never became a passenger, and no matter how the car started, whether fast or by a jerk, there was no negligence as to her. In Klinck v. Chicago City Railway Company, 363 Ill. 260, the court uses the words, "the act of any such person attempting to board the car" and intimates

that such an act makes one a passenger. Quite obviously "attempting" means getting, at least in part, the body directly from the street on to the car, and "not" means any one of the many movements made while actually getting on. It is claimed for the plaintiff that the instruction was erroneous in assuming that she was on the street. But, she must have been there before making an attempt, if she did make one, to board the car, and the instruction has reference to her situation as it may have been prior to the time she attempted, if she did, to board the car. Under the circumstances, although the instruction is not well drawn, we think when it is reasonably considered, it cannot be said in any way to have misled the jury.

As to the instruction numbered 12, which instructs the jury "that if they find from the evidence that the plaintiff was injured while boarding the car while it was in motion, then she cannot recover in this case", it is sufficient to say that taken in conjunction with instructions numbered 1 and 2, it would not be reasonably conceivable that the jury was misled. The words "boarding the car while it was in motion", meant that her first movement to get on was made while the car was in motion. That, of course, she had no legal right to do.

As to instruction numbered 27, it was simply more explicit than number 12, and in no way erroneous.

(2) As to alleged errors in ruling upon matters of evidence. (a) It is contended that certain questions put to Roy Greco and Ben Greco in regard to what they testified to on the first trial should have been allowed. An examination of the record leads to the conclusion that the questions which were propounded either pertained to matters which were immaterial or

were not in their essence, impeaching, and so were properly ruled out.

(b) It is contended that the trial judge erred in striking out the answer, "she was very sick", which was given in answer to a question asking how the defendant appeared. The answer was obnoxious for two reasons, first, she was not asked what was the condition of the defendant, and, secondly, it would have been incompetent if she had been.

(c) It is contended for the defendant that the trial judge erred in not permitting a certain question propounded on the redirect examination of Jacob Schubin, a witness for the plaintiff. The record shows that the subject involved in the question had been gone into quite carefully and fully on the direct examination. That was sufficient. We do not think it would have been error for the court to have permitted it. But, twice, already, once on direct examination, and once on cross examination, the same subject had been presented to the witness. The trial judge evidently concluded that the witness's knowledge on that subject had been sufficiently exhausted, and so sustained the objection. We do not feel justified in holding that that constituted any substantial error.

(d) The objection in regard to the testimony of Richard Newman is insubstantial. Whether or not he told the jury he went or did not go to the attorney's law office or to the defendants' offices, was at best, a trifling matter.

(e) It is contended that the trial judge erred in refusing counsel for the plaintiff an opportunity to subpoena somebody connected with a certain stenographic firm. The record fails to show, however, that any such representations

were made to the court as would have justified a suspension of the trial.

The record discloses that there was a fair trial, that the jury were appropriately instructed, and that the verdict is not against the manifest weight of the evidence. The judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

(3374)

117 - 28012

GEORGE T. STEEN and HORATIO H. HARWOOD, co-partners, doing business as STEEN & HARWOOD,

Appellees,

v.

JOSEPH CUMMINS,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I.A. 605

Opinion filed Oct. 17, 1928.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiffs, real estate brokers, were employed by the defendant Cummins, to obtain a purchaser for two lots in Rogers Park. They got one Masters to agree to buy them for $6500.00, subject to an incumbrance of $1,000.00. One hundred dollars was paid by Masters to the plaintiffs as earnest money, and the balance of $4400.00 was to be paid upon delivery of the deed. The contract of sale was dated October 12, 1921, and contained the following: "It is understood and agreed that $1500.00 in bonds will be taken in at $1447.50. Issue consists of two $500.00 bonds on Madison Square Office Building * * *, and $500.00 on Drake Hotel." After the contract of sale had been signed by Masters, but before it was signed by the defendant, Patrick, an employee of the plaintiffs, took it to the defendant, and, after some discussion as to the $1500.00 of bonds which were to be taken as part of the purchase price, Cummins signed the contract, and wrote at the bottom in Patrick's presence, "Broker agrees to cash bonds at not less than $1395.00."

Patrick testified that the defendant asked him what was

then the market value of the bonds and that he told him he had telephoned to Strous & Co., and they agreed to take them at $1395.00; that the defendant said he did not want to stand the difference between $1395.00 and $1500.00; that he, the witness, said "suppose I stand part of the loss; and make the commission $300.00 instead of $450.00; that the defendant said; "That's fair enough" and the commission was accordingly reduced to $300.00; that then the defendant wrote in ink at the bottom of the contract of sale and purchase, "Broker agrees to cash bonds at not less than $1395.00", and signed the contract. The defendant testified that when Patrick brought the contract to be signed, he told him it was understood he was not to take the bonds; that Patrick said it was all right; that he had seen Strous &Co. and that they would take them; that he, the witness, said to Patrick, "You know that, and I don't, so we will put it right in here", and that he, the defendant then wrote in the words with Patrick's consent, and then signed the contract.

On Wednesday, the day before Thanksgiving, 1931, the defendant, together with Patrick and Masters the purchaser, went to the Chicago Title and Trust Company to close up the sale. From there, defendant says, they went to Master's Attorney's office. Some question having arisen in regard to the bonds, Patrick and the defendant and Masters went over to the offices of Strouse & Co. Patrick testified that they were informed that owing to the present condition of the market the bonds could not be cashed; that the defendant asked him, the witness, what he was going to do about it; that he, Patrick, answered, "There is nothing that I can do about it. The conditions are different at that time

than when they agreed to take them in."; that the defendant proposed that the closing be postponed till Friday morning, which was agreed to. The defendant testified that they all went to Master's Attorney's office; that Masters asked, how about the bonds; that he, the witness, replied that Patrick had made arrangements and would cash them right away; that at Master's suggestion they went to Strauss & Co.'s, and were informed that they could do nothing; that they had no agreement to cash the bonds; that Masters, Patrick and himself, the witness, left; that Patrick parted with them on the street that then he, the witness and Masters went back to Master's Attorney's office and closed the deal, the deed being then delivered; that Patrick was not then present. Subsequently in a conversation between Patrick and the defendant, according to the defendant, Patrick asked for the balance of the commissions, but, he, the defendant, told him he stood upon the plaintiff's taking care of the bonds. He also testified that Steen, one of the plaintiffs, called up and asked for the balance of $100.00 and that he told him, he, Steens, had not cashed the bonds and that he, the defendant, would insist upon performance of the contract.

Patrick testified that about the last week of 1921, the defendant called him on the telephone and asked him what he thought he could do with the bonds; that he told the defendant that he thought he could get a loan of $1300.00 on them at the bank if the defendants would pay the balance of the commission; that the defendant declined the proposition.

It is the testimony of Patrick that on Friday after Thanksgiving, 1921, he telephoned the defendant, charging him with closing the deal in his, the witness's absence, and stating

that he, the defendant, had not left a check for the $100.00, and asking when he would send it; that they had a wrangle over the telephone, and that the defendant said he did not think the plaintiffs were entitled to it. The bonds have never been in the possession of the plaintiffs, and there is no evidence whether the defendant still owned them at the time of the trial.

At the close of the trial, which was without a jury, three motions were made, (1) that judgment be entered for the plaintiff for $100.00, (2) that judgment be entered forthe defendant on the plaintiff's claim, and (3) that judgment be entered for the defendant on his set off for $100.00. The court allowed the first and denied the two motions of the defendant. Judgment was then entered in favor of the plaintiff and against the defendant for $100.00. This appeal is therefrom.

When the defendant orally employed the plaintiffs to obtain a purchaser, the law implied an obligation on his to pay reasonable commissions. On October 19, 1921, when Masters signed the contract of sale the commissions were earned unless the contract was unsatisfactory to the defendant. It was unsatisfactory as the evidence shows in regard to the nature of the payemt which was to be made. It provided that the defendant should accept $1500.00 of bonds as payment of $1447.50 of the purchase price of $5500.00. To that provision the defendant objected. At that time, it cannot properly be said that the plaintiffs had furnished a purchaser. Negotiations then took place betweenPatrick, the plaintiff's representatives, and the defendant. Just what occurred is in some measure conflicting, but it is proved, that at the time Patrick took the contract of sale, already signed by Masters, to the defendant, the latter, after some conversation with Patrick in regard to the bonds, in which the defendant said he did not

want to stand the difference between $1395.00 and $1447.50, wrote at the bottom of the contract, in Patrick's presence, and apparently without objection by Patrick, "Broker agrees to cash bonds at not less than $1395.00" and then himself, also, in Patrick's presence, signed the contract. Up to that time the plaintiffs had not provided a purchaser, as it is not in evidence on just what, if any terms, it was originally agreed the property should be bought. It follows, therefore, that as the contract of employment was entirely oral - what was written in the contract of sale only bound the signatories of that instrument - it must arise and be determined by all that was said between the parties. Such a contract is unilateral, that is a promise upon the part of the owner that if the real estate agent does certain things, or brings about a certain situation, a commission will be earned and paid. It is true that Masters paid the plaintiff, $100.00, as earnest money when the contract of sale was signed by him, but at that time, the plaintiffs had not furnished a purchaser unless the seller was satisfied to take the bonds at the figure mentioned therein. He was dissatisfied and so, until the talk between the defendant and Patrick had taken place, and the defendant had written the extra words at the bottom of the contract, and signed it, the plaintiffs had not done those things which executed the contract on their part and bound the defendant. There was then a completely executed contract, with certain reciprocal obligations. The obligation on the defendant was to allow the plaintiffs to keep the $100.00 which they had received as earnest money and which they only held up to that time as trustees, and, also, to pay them $100.00, being the balance of the $200.00 agreed upon. The obligation on the plaintiffs is, of course, the chief matter in dispute. There is one circumstance, how-

over, which is admitted by Patrick, and is consistent with the testimony of the defendant, that seems to be overwhelmingly persuasive, and that is that negotiations took place between Patrick and the defendant, and that the defendant wrote the extra words at the bottom of the contract in Patrick's presence. Patrick admits that was done. Their testimony disagrees as to just what was said, but the writing is admitted, and it strongly corroborates the defendant's testimony.

In other words, how many the plaintiffs reasonably deny that, as part of their undertaking, and before the defendant was bound to recognize Masters as a purchaser, they proceed to cash the bonds at $1395.00 when Patrick testifies that at the close of the discussion about the bonds, the defendant in his presence and apparently without objection wrote in the contract, the words, "Broker agrees to cash bonds at not less than $1395.00"? The original contract of employment, whatever it was, became by reason of further negotiations, one which as a part of it bound the plaintiffs to cash the bonds for $1395.00. It follows that as the burden of proving an indebtedness, upon the part of the defendant, was on the plaintiffs, they have manifestly failed and the judgment must be reversed.

As to the claim of the defendant for the $100.00 which the plaintiffs received from Masters, the burden was upon the defendant to show that he had suffered a loss, they he still had the bonds, or that they were sold for less than $1395.00. There is no evidence on that subject.

The judgment will be reversed.

REVERSED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

(3375a)

302 - 28037

J. R. MYERS COMPANY,
a corporation,

Appellee,

v.

THOMAS CUSACK COMPANY,
a corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 306

Opinion filed Oct. 17, 1933.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On August 5, 1933, the plaintiff, J. R. Myers Company began a suit of forcible detainer against the defendant, Thomas Cusack Company, for possession of the east 300 feet of lot nine (9) block one (1), Carson and Chytraus Addition to Chicago, and on August 24, 1933 the court, without a jury, found the defendant guilty and that the right to possession was in the plaintiff. This appeal is therefrom.

At the trial two papers which purported to be leases were offered in evidence. One was signed by Max Thorek, the owner of the lot in question. It was dated and signed July 19, 1932, and recites that "In consideration of One Thousand Nine Hundred and Twenty Dollars per year, * * * the undersigned leases to J. R. Myers Company," the premises in question "for the purpose of erecting and maintaining billboards * * * from the first day of August, 1932 to the first day of August 1935", etc. The other paper was dated July 18, 1933, but was actually made out and signed by the defendant on July 31, 1933. It recites that, in consideration of $2700.00 per year, Max Thorek leases to the Thomas Cusack Company the property in question

(3376)

No. 2.

for the purpose of erecting and maintaining advertising signs for a period of three years from a period not later than September 21, 1922. The signature to that paper is as follows: "Dr. Max Thorek, B. E. Halas & Co., per Andrew G. Halas, Authorized Agent, and Thos. Cusack Company, E. H. Hammer."

There was also offered in evidence a letter dated May 1, 1922, from Thorek to B. E. Halas & Co., giving that company authority to lease the premises in question. The last clause of that letter is as follows: "It is understood that all leases or any transactions are subject to my approval."

The sole contention made on behalf of the defendant is that the document dated July 19, 1922, signed by Thorek, the owner, but not signed by the plaintiff, did not constitute a valid lease and did not take priority over the document dated July 19, 1922, but actually executed on July 21, 1922, on the ground that there was no acceptance by the plaintiff.

At the trial certain testimony was introduced on behalf of the defendant, apparently with the purpose of showing that the defendant's lease of July 21, 1922, ought to be given priority over that of the plaintiff.

One Hammer, employed by the defendant as a space buyer, testified that he was present on July 18, 1922, when the defendant's lease was signed at the office of Halas & Co.; that he made a proposition to Halas of $225.00 a month for a three year contract; that Halas stated that he would accept the defendant's proposition; that he would not sign the lease that day but that if Hammer would come in on the 21st Halas would then sign the lease; that Halas said the defendant could go ahead and take immediate possession and everything would be all right; that the defendant

took possession on the 19th and erected signs on the property. But, upon being recalled, Hammer testified that the day he was at Halas's office was Friday, July 21st, and that the day the structure was erected was Saturday, July 22nd. Both dates being subsequent to that of the plaintiff's lease.

In rebuttal one Thorn testified for the plaintiff that he had carried on the negotiations forthe plaintiff in regard to leasing the property in question; that at his first negotiations with Thorek, the owner, when they arrived at a rental figure, Thorek suggested that he, Thorn, call on Halas; that on July 13th, he called on Halas; that together they discussed the matter and he asked Halas if he had authority to sign the lease; that Halas said Thorek would sign it; that that was in the afternoon of July 19th; that he, Thorn, went directly from Halas's to Thorek's office and told him what Halas had said and after getting the legal description of the property from Thorek he, Thorn, wrote out the contract and Thorek signed it; that on the following Tuesday, he telephoned Halas and asked him how it happened that the defendant had erected a sign-board on the property in question; that Halas said that he knew that Thorek had previously signed the plaintiff's lease but that the defendant, The Cusack Company said "they would relieve him from any responsibility or liability in the event of any difficulty on the proposition, so he had made - gave them this contract"; that Halas said he gave the defendant a lease on the previous day, which was Monday, July 24th.

From the foregoing it will be seen that the plaintiff's rights are entitled to priority over those of the defendant providing the execution and delivery of the lease to the plaintiff and its acceptance by him, without being signed by the latter, constituted a binding contract.

The evidence shows that the contract of leasing was made between the plaintiff and Thorek, the owner, on July 19, 1930; that that contract provided that the plaintiff should pay $1200.00 a year for three years forthe use of the premises for maintaining bill-boards. That contract would be good even if made orally were it not for the statute of frauds. But,here, the owner, signed a writing covering all the essential elements of a contract of leasing and that was delivered by him to the plaintiff and accepted by the latter as evidence of their contractual relations. As the court said in Bergmann v. Villani, 117 Ill. App. 272, "it is no more necessary for a lessee to sign the lease, which is a mere conveyance of an estate carved out of the fee, than it is for the grantee in a conveyance in fee to sign the deed, in order to be bound by its terms."

In Dupuis v. Rivais, 217 Ill. App. 354, 357, the court said, "It seems to be well settled in this State that when one party has executed such a paper and the other party has accepted it, the latter is bound by its terms and conditions as completely as if he had signed the paper."

Doxey's Estate v. Service, 30 Ind. App. 174. In the latter case the court used the following language: "The leases, which are made exhibits, show that, while signed and duly acknowledged by the lessor, they do not bear the signature or acknowledgment of the lessees. Upon this fact it is argued by counsel for appellant that the leases were never executed and hence are not binding upon it. The complainant avers that the lessor fully executed the contract; that it was accepted by the lessees; that they have ever since held it, and claimed the right to exercise the privileges herein granted. Under the authorities, such a

contract is binding upon the lessees, notwithstanding they did not sign it."

Where, after negotiations, as here, the owner of real estate signs a paper containing all the elements of a lease and delivers it to the lessee who accepts it as a lease, there is then a binding contract.

Inasmuch, therefore, as the lease by Thorek to the plaintiff was a valid and outstanding obligation and bound the owner at the time he undertook, through his agent, to give a lease to the defendant, the plaintiff was entitled by forcible detainer to oust the defendant.

The judgment will be affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

21 - 27812 (3376a)

MORRIS KOMINSKY, Admr., etc.,
Plaintiff in Error,

v.

MORRIS L. ARKIN,
Defendant in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

231 I.A. 306

Opinion filed Oct. 17, 1923

MR. JUSTICE O'CONNOR delivered the opinion of the court.

On August 19, 1919, Alex Kominsky, a minor, by his next friend, brought suit against Morris L. Arkin, the defendant, to recover damages for personal injuries. While the suit was pending the plaintiff died as a result of the injuries, and an order was entered February 19, 1921, suggesting his death and substituting Morris Kominsky as administrator of his estate. Leave was also given plaintiff to file an amended declaration instanter, which was accordingly done.

The amended declaration was based on a cause of action created by the Injuries Act of this State. Thereafter the defendant filed two pleas to the amended declaration. Afterwards there was a substitution of counsel for the defendant. About ten days thereafter, when the case went to trial, the defendant asked that an order be entered giving him leave to withdraw the pleas and to file in lieu thereof a plea in abatement on the ground that the suit as instituted had abated by the death of the plaintiff and a new suit should have been instituted by the administrator, but the court denied the motion and the case went to trial. After the plaintiff had closed his case the defendant took the stand in his own behalf. Counsel for plaintiff objected to the witness testify-

Opinion filed Dec. 17, 1982

ing on the ground that he was rendered incompetent by section 2, Ch. 21, Cahill's Stats., which provides that no party to a civil action shall be allowed to testify in his own behalf when the adverse party sues or defends as the administrator of a deceased person. The court then stated that unless the objection was waived he would give plaintiff leave to withdraw a juror and file a suit under the Injuries Act. Counsel for plaintiff then conferred with his client and withdrew the objection to the competency of the defendant to testify in his own behalf. Counsel then stated that he wished the record to show that it was done under protest, which the court said he would allow. But later the court insisted that the objection be withdrawn without qualification, and this was done. The case then proceeded and the jury returned a verdict in favor of the defendant upon which judgment was entered, and the plaintiff prosecutes this writ of error.

The evidence shows that Alex Kominsky, a boy of about ten years of age, while crossing Oakley boulevard near the intersection of Potomac street, about 8:30 in the evening of May 14, 1919, was struck and injured by an automobile driven by the defendant and severely injured. He died as a result of such injuries about a year and one-half after the accident. Since there must be a new trial on the sole ground of erroneous instructions, we refrain from discussing the evidence. This also makes it unnecessary to discuss the other points made by counsel for plaintiff, and in this connection we think it would be sufficient to say that the points which plaintiff makes would not warrant us in disturbing the judgment were there no error in the instructions.

Complaint is made to the giving of instructions

1, 2, 3, 4, 12, 14, 15, 16, 18, 19, 20, 23, 24, and 27 on behalf of the defendant. There were seven counts in the declaration. They all charged the defendant with negligence in the operation of the automobile. Some charged wantonness and wilfulness; some a failure to have proper lights on the machine and some the failure to sound the horn. Instruction 1 told the jury they were not permitted to assume that the deceased was exercising due and proper care for his own safety at the time of the accident, but that the plaintiff was required to prove such fact by a preponderance of the evidence. If the jury believed from the evidence that the defendant was wilfully and wantonly negligent, the fact that the deceased was not in the exercise of ordinary care for his own safety would not prevent a recovery, and the instruction was therefore wrong. Ehrlich v. Chicago, Gt. Western R. R. Co., 187 Ill. App. 379.

Instruction 2 defined ordinary care to be such as an "ordinary prudent and cautious person would have exercised under like circumstances." This might have been correct if the person injured was an adult, but was not accurate where the person was a ten year old boy, as in the instant case. I. C. R. R. Co. v. Johnson, 231 Ill. 42. Instruction 3 told the jury "where witnesses testify that certain facts took place, and other witnesses of equal stability and equal means of knowledge testify that such facts did not take place, the jury shall weigh all the testimony and give a verdict as the weight preponderates." We think this instruction should have been omitted entirely as it would in no way assist the jury in arriving at a correct verdict.

Instruction 4 was to the effect that due care and caution required of the deceased was such as might reasonably

be expected under the same or similar circumstances of a boy of his "age, experience and capacity to comprehend and avoid danger." As stated above, the plaintiff would not be required to exercise due care if the jury found the defendant was guilty of wilful and wanton negligence. Instruction 13 told the jury that before they could find in favor of the plaintiff it must appear that "deceased was not guilty of such negligence as would preclude him from recovering in this action if the deceased was the plaintiff and had survived the injuries complained of, and if you do not so find, then you must find the defendant not guilty." This instruction was wrong. It left out of consideration the charge of wantonness and left the jury in the dark as to what negligence might preclude the deceased in case he survived. This instruction should have been omitted altogether. By instruction 14 the jury were told that if they found from the evidence that any witness had knowingly and wilfully sworn falsely to any material matter, then they were at liberty to disregard the entire testimony of such witness except in so far as it had been corroborated by "other suitable evidence, or by the facts or circumstances proven at the trial." This instruction was wrong as it left the jury to determine what was suitable evidence.

Instruction 15 was on the question of damages and told the jury they could not allow for pecuniary loss sustained by the heirs of the deceased, and then it said: "and in so this, the testimony in the case must have furnished the data upon which the jury may calculate or approximate to an estimate of the pecuniary value of the life of the persons for whose benefit the plaintiff is entitled to damages." The law does not require that data on this question be supplied by evidence

before the jury can fix the amount of their verdict. We think there was no substantial error in instruction 16. By it the jury were told that the plaintiff must prove his case as alleged in the declaration or some count thereof by a preponderance of the evidence, and if they found the evidence equally balanced, their verdict should be for the defendant.

Instruction 18: this instruction also disregarded the wilful and wanton counts of the declaration and, therefore, was wrong. Instruction 19 was to the effect that it did not follow that because a person was injured there could be a recovery; "there must be an injury caused by some actionable negligence of the defendant." This instruction was misleading and should not have been given. It did not define what was meant by actionable negligence.

Instruction 20: by this instruction the jury were told that the weight of the testimony did not necessarily depend upon the greater number of witnesses, but that thejury was at liberty to consider "not only the number of witnesses but also all of the facts and circumstances obtained from the evidence of the case, and determine from that which of the witnesses are worthy of the greater credit, and if you believe that the evidence of the smaller number of witnesses on one side is more credible and trustworthy than the evidence of the greater number on the other side, then the evidence preponderates on the side of the smaller number of witnesses." In the instant case seven witnesses testified for the plaintiff and the defendant was practically the only witness in his own behalf. This instruction was therefore clearly prejudicial. It might tend to cast suspicion on the credibility of plaintiff's witnesses. Such

an instruction should only be given when so worded as not to single out a witness from one side or the other. Ralph v. Chicago Rys. Co., 294 Ill. 586.

Instruction 23 told the jury that it was not only their duty to decide the case according to the evidence but that it was also their duty to decide it according to the law as given by the court; and while the attorneys for the respective parties might state to the jury what they believe the law to be in their argument, still under their oaths, the jurors have no right to consider anything as law except that which was given them by the court. This instruction was held to be erroneous in the case of Brun v. Chicago City Ry. Co., 187 Ill. App. 133. Instruction 24 was to the effect that the jury, in determining the question of the guilt or innocence of the defendant, could do so solely "upon the evidence produced by the trial and the instructions of the Court, " " " unaided and uninfluenced by any of the knowledge, if any, you may have gained from any other source." This instruction was erroneous, for the jury were to find whether the defendant was guilty or innocent from the evidence, under the instructions, and from whatever knowledge they might have gained from observation and experience. This instruction was in no way helpful to the jury but was misleading.

By instruction 27 the jury were told that evidence showing or tending to show the violation of an ordinance or statute was only prima facie evidence of negligence, and if they found from the evidence that the defendant committed any other act of negligence, and they believed from the evidence that the violation of the statute was not the proximate cause of the injury, then they should find the defendant not guilty. Two counts

in the declaration charged two separate violation of the statute - failure to have lights on the automobile and operating it at an excessive rate of speed. This instruction was wrong and should not havebeen given.

Counsel for defendant argue that while some of the instructions offered by them were not accurate, yet upon a consideration of the entire series the jury were fully instructed, and that this is all that the law requires and the judgment should not, therefore, be disturbed. The instructionsas a whole given on behalf of the defendant were clearly wrong and prejudicial, and we are, therefore, unable to say that the verdict would have been the same had the instructions been correct. In these circumstances the judgment cannot stand and it is reversed.

The judgment of the Superior Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

TAYLOR, P.J. and THOMSON, J. CONCUR.

(3377)

44 - 37873

JOHN A. DONAHUE, trading as JOHN A. DONAHUE & CO.,

Plaintiff in Error,

v.

WHEELING MOLD & FOUNDRY COMPANY, a corporation,

Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

231 I.A. 303

Opinion filed Oct. 17, 1923.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover $11,835 with interest thereon at 5% per annum from September 15, 1913, claimed to have been sustained by him by reason of the defendant's breach of a contract. The case was tried before the court without a jury and at theclose of plaintiff's case there was a finding and judgment in favor of the defendant and plaintiff prosecutes this appeal.

The evidence tends to show that plaintiff had some drawings and patterns for the construction of road rollers; that the defendant was in the foundry business at Wheeling, W. Va. and that the parties entered into an agreement, whereby the plaintiff proposed to sell his roller business to the defendant for $7,000.00, to be paid for $2,000.00 cash, when the patterns were ready for shipment and the remaining $5,000.00 was to be paid by the defendant constructing ten rollers according to the drawings and patterns, which ten rollers were to be sold by the plaintiff for $2,150.00 each. Upon the sale by plaintiff of the second, fifth, seventh and tenth rollers, he was to give credit to the defendant of $1,250.00

(3377)

each. The remaining six rollers were to be furnished to plaintiff at 25% off the list price of $3,150.00 each and, upon the sale of them by plaintiff, he was to turn over the customers' order, cash and notes for these machines. And all of the sales were to be contracted for in the name of the defendant company.

The terms of the foregoing agreement were embodied in a letter from the plaintiff to the defendant dated March 3, 1913, and it is plaintiff's contention, that this letter constituted the contract between the parties, supplemented by a letter written the next day, March 4, 1913, by plaintiff to defendant, which stated that the first roller should be ready for delivery June 5 and the last not later than September 5, 1913.

The evidence further shows that the first roller was not completed until about January 30, 1914 and four other rollers were completed during the months of June and July, 1914. None of the rollers were sold by plaintiff nor did he obtain an order for the sale of any, but plaintiff's position is that he was excused from doing so because: (1) the rollers were not completed in accordance with the letter of March 4, 1913, viz. not later than September 5, 1913; and (2) because a representative of the defendant on May 4, 1914, wrote plaintiff that the roller, as designed was to be a 7 ton roller, but when it was completed, according to plaintiff's plans and drawings, it weighed 17,000 pounds; that on account of this extra weight, the sale price would have to be increased to $3,250.00 and that plaintiff would receive but 20% discount instead of 25% as the original contract provided.

A great deal is said in the briefs filed by both parties as to whether the contract between the parties was a written or verbal contract,- plaintiffs taking the position that it was embodied in the letter of March 3, 1913, modified by the letter of March 4, 1913, and the defendants taking the position that the letter of March 3, confirmed a verbal agreement entered into between the parties on March 1, 1913 and that the letter of March 4, 1913, was in no way assented to by it.

(1) Under the evidence we think the defendant's version must be sustained. But it is immaterial in the decision of this case whether the contract was oral or in writing or whether it was modified by the letter of March 4, because the evidence clearly shows that plaintiff did not furnish defendant with all the drawings and patterns until a considerable period of time had elapsed after the contract was entered into and this caused a delay in the making of the rollers. Moreover, the correspondence in the record, which was offered by the plaintiff, clearly shows that he was not expecting the rollers to be delivered not later than September 5, 1913, because for many months thereafter the correspondence shows he was endeavoring to secure the rollers and the defendant was manufacturing them.

(2) We think plaintiff's contention that he was excused from making the sales on the ground that, by the letter of May 4, 1914, he was advised that the rollers weighed about 17,000 pounds and, in his opinion were, therefore, of no use as it would be impracticable to operate such a heavy roller and that, by the same letter, he was advised that the price must be increased and his discount decreased, cannot be maintained. Because shortly after May 4, 1914, the defendant advised the plaintiff that they would live up to their contract in every

respect and give him a discount of 35%, and considerable correspondence thereafter followed between the parties which tends to show that plaintiff gave no consideration to the letter of May 4, 1914. The evidence further shows that the rollers, in fact, weighed but 13,009 pounds, which was not more than contemplated by the drawings and patterns although this fact plaintiff states was not known to him until after suit was brought. Plaintiff also contends that the evidence shows that the driving roll was 470 pounds heavier than it should have been and that this rendered the roller of little or no value. The evidence does show that the driving roll was (470 pounds) heavier than plaintiff contends it should be but we think it falls far short of showing that even in this respect the roller would not work properly.

Under the terms of the contract plaintiff could not obtain the $5,000.00 which he claimed remained due him, except upon the sale of rollers by him. He never made such a sale and he was not excused from doing so by any thing done by the defendant.

Under these circumstances we think the trial court was right in entering judgment in favor of the defendant and the judgment of the Municipal Court of Chicago is, therefore, affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

(3378)

53 - 37884

JUNE HALLAGAN, infant, by RICHARD HALLAGAN, her next friend,

Defendants in Error,

v.

JENNIE MYLES AND JOSEPH HAMLIN,

Plaintiffs in Error.

ERROR TO CIRCUIT COURT; COOK COUNTY.

231 I.A. 306

Opinion filed Oct. 17, 1923.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff a minor by her next friend brought suit against George W. Quinn, Jennie Myles and Joseph Hamlin, to recover damages for personal injuries. There was a trial before a judge and jury and a verdict rendered in plaintiff's favor for $30,000.00. On the argument for a new trial, at the suggestion of the court, plaintiff remitted the sum of $10,000.00 and the motion for a new trial was overruled and judgment entered against the defendants for $20,000.00. Each of the defendants prayed for and were allowed an appeal to this court, but neither of them perfected such appeal. Afterwards the defendants Jennie Myles and Joseph Hamlin sued out a writ of error from this court and an order of severance was entered as to the defendant Quinn.

The record discloses that plaintiff, an infant of less than eight months of age, was placed in a baby carriage by her mother and was being pushed north across Lake Street at the intersection of Kedzie Avenue. Kedzie Avenue runs north and south and is intersected by Lake Street. Lake Street overhead is occupied by the elevated railroad structure, and there are pillars supporting the elevated structure at the

(6372)

11 - 1787.

four corners of the intersection. Plaintiff's mother about three o'clock in the afternoon of July 22, 1913, was pushing a buggy in which the plaintiff was riding, from the southwest corner of the intersection north and when she was partly out in the roadway of Lake Street, she heard an automobile truck coming rapidly from the east with its cutout open. This truck was being driven by the defendant Quinn, and plaintiff's mother upon seeing the truck approaching pulled back her baby carriage toward the south. About this time she saw another automobile coming south on Kedzie Avenue, north of Lake Street. It was occupied by the defendants Styles and Hamlin; Hamlin was driving this touring car.

The evidence shows that both cars were coming at a rapid rate of speed, although the truck driven by Quinn was coming faster than the automobile, and it was evident that there was to be a collision between the two cars. When Quinn was in Lake Street near the east side about the east cross walk of Kedzie Avenue, he turned his car to the south, endeavoring to pass around in front of the automobile, and then turned toward the north near the west cross walk of Kedzie Avenue, as he did so, the automobile struck the truck somewhere on the north or right hand side and threw it against the baby carriage in which defendant was riding. The carriage was thrown against one of the pillars supporting the elevated structure and plaintiff was severely and permanently injured.

The declaration consisted of three original and five additional counts. The court instructed the jury that the second original count and the first and second additional counts were not sustained by the evidence and the jury were instructed that recovery could not be had under these counts so that the case went to the jury on the first and

third original counts which charged negligence in the driving of the automobile and truck and the third, fourth and fifth additional counts, charging trespass Vi et armis. The defendants filed pleas of not guilty.

1. Counsel for Joseph Hamlin contend that the court should have instructed the jury to find him not guilty, because the evidence shows that he was not guilty of any negligence in the case. It would serve no useful purpose to analyze the evidence in detail, and since the judgment must be reversed, we refrain from doing so. It is sufficient to say that whether Hamlin was guilty of negligence under the evidence, was a proper question for the determination of the jury, and the court was right in overruling his motion for a directed verdict. The evidence was sufficient for the jury to support the verdict as against him.

2. The defendant Jennie Myles contends that the court should have instructed the jury to find her not guilty because the evidence shows that the defendant Joseph Hamlin, who was driving the automobile was not her agent or servant, and since the only theory on which she could be held liable was that the automobile, which belonged to her, was being operated or driven by her agent Hamlin, it was error for the court to deny her motion for directed verdict. We think this contention must be sustained. The uncontradicted evidence is that Jennie Myles was the owner of the automobile; that she had been acquainted with the defendant, Joseph Hamlin, for sometime, and had often loaned him the car; that the accident occurred on Tuesday afternoon; that on the prior Sunday Hamlin had borrowed the car from her to drive to Fox Lake, which is located some fifty miles north of Chicago; that he left Sunday night around midnight

alone in the car; that he arrived at his destination sometime Monday morning, slept during that day and on Monday afternoon, according to prior arrangement, he drove to Libertyville which is located between Chicago and Fox Lake, and there met Mrs. Myles on Monday evening, and then drove her back to Fox Lake where they stayed that night, and began a return trip to Chicago on Tuesday morning and were on their way home when the accident occurred. Hamlin drove the car both to Fox Lake and return, and the evidence is undisputed that he had borrowed the car from the defendant Jennie Myles. This evidence shows that the automobile was in the exclusive control of Hamlin, and there was no evidence of any negligence on the part of defendant Myles, and, therefore, the court should have instructed the jury to find her not guilty as requested. But plaintiff contends that the defendant Myles is in no position to dispute the ownership and operation of the automobile at the time in question, for the reason that she had only filed a plea of not guilty and that this admitted the allegation of ownership and operation of car by her.

It is the law that where, for instance, a suit is brought for a personal injury against a railroad company and it is alleged that the railroad and cars were owned and operated by the railroad company at the time plaintiff was injured, that the ownership and operation is admitted by the plea of general issue and that the only way such a question can be properly raised is by filing a special plea: Wabash v. Lockridge, 137 Ill. 270; Chicago Union Traction Company v. Kirby, 227 Ill. 95. But we think that this rule of law cannot be invoked by the plaintiff here. It is at least doubtful whether the allegation of the counts remaining sufficiently alleged that

the automobile was owned and operated by the defendant Myles at the time in question. But in any event the evidence of the defendants to the effect that the automobile was being controlled and operated by the defendant Hamlin was admitted without objection. The point now made was not in any way brought to the attention of the trial court and it is elementary that such a point cannot be urged for the first time in a court of review.

3. The defendants Jennie Myles and Joseph Hamlin further contend that the counts of the declaration which charge assault and battery, trespass vi et armis, should have been instructed out of the case, andthat the trial court erred in its refusal to do so as requested. Even if there was error in this respect, which we do not decide, we would not be warranted in disturbing the judgment because there is no complaint that the remaining counts did not state a cause of action and were sustained by the evidence. Scott v. Harlin & Ormsdorff Co., 345 Ill. 480. In that case it was held that the erroneous denial of a motion to take from the jury counts of the declaration which there was no evidence to sustain, was not a ground for reversal if there was one good count which the evidence did sustain, as it would be presumed that the jury based their verdict on the count supported by the evidence.

Whether the court was wrong in instructing the jury to disregard the counts which charge willful and wanton negligence is not properly before us. But we might say in passing that we think there was sufficient evidence to sustain these counts. Such a question was one of fact for the jury. Children Express Co. v. Krug, 321 Ill. 472. We might further say that

we are unable to see how the counts charging willful and wanton negligence or the counts charging assault and battery would be of any benefit to plaintiff in the case, because she was too young to be guilty of contributory negligence and was not asking for exemplary or vindictive damages. All she asked in the instruction submitted in her behalf was compensatory damages and these damages are properly allowable under the counts charging negligence generally.

4. It is further contended that there was error in the giving of plaintiff's instruction No. 13. By that instruction the jury were told, that driving an automobile through a street where both sides are occupied by houses, at a rate of speed more than ten miles per hour was a violation of the law, and if the jury believed from the evidence that at and prior to the time of the accident the defendants were driving the automobile at a faster rate of speed than ten miles per hour, such persons were guilty of a violation of the statute of this state, and it is argued that the record does not disclose that the street at this point was closely built up. This argument is not sustained by the record. Plaintiff's mother testified that both sides of Lake Street and also Kedzie Avenue in the neighborhood of this intersection were built up with "two story buildings * * * all business houses." Photographs were introduced in evidence, which clearly show that the streets in question are closely built up on both sides, but we think the instruction does not state the law correctly. The section apparently under consideration was Section 10 of the Motor Vehicle Act of 1911. That section provides that no person shall drive a motor vehicle upon a public highway in this state, at a greater speed than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb

or injure the property of any person. "If the rate of speed of any motor vehicle * * * operated upon any public highway in this State where the same passes through closely built up business portions of any incorporated city, town or village exceeds ten (10) miles an hour * * * such rate of speed shall be prima facie evidence that such person operating such motor vehicle * * * is running at a rate of speed greater than is reasonable and proper having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person." This section does not directly prohibit driving in excess of ten miles per hour, but only makes such driving prima facie evidence of unreasonable speed, which is prohibited. The instruction was inaccurate and should have been refused for that reason.

Since the judgment is against both the defendants Jennie Myles and Joseph Howlin, and since it is wrong as to Jennie Myles, it must be reversed as to both. Christensen v. Johnston, et al 307 Ill. App. 209.

The judgment is reversed and the cause remanded to the Circuit Court of Cook County.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

(3379)

75 - 27907

T. S. ARTHUR,

Appellee,

v.

THE SALVATION ARMY,
a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

231 I.A. 606

Opinion filed Oct. 17, 1933.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an act of assumpsit against the defendant to recover damages claimed to have been sustained by him by reason of defendant's breach of a contract of employment. The defendant's demurrer to the declaration was overruled and it elected to stand upon it. Judgment was thereupon entered in favor of plaintiff and against defendant for the amount of his claim, $1,633.00 and this appeal follows.

The only question in the case is the sufficiency of the declaration to sustain the judgment.

The defendant contends that (1) the allegations of the declaration are not sufficient to show that a contract of employment had been entered into between the parties; and (2) that even if the defendant is wrong in this respect, the declaration was insufficient because there was no breach of contract alleged.

Correspondence which was had between the parties is set up in the declaration and tends to show that prior to

the matter in question plaintiff had been employed by the defendant; that his services had been satisfactory and that defendant was looking forward to employing him in similar work for the next year. And on December 3, 1919, the defendant wrote plaintiff a letter wherein it stated it was booking field men for campaign work in the western states for 1920, and that it was prepared to offer employment to plaintiff beginning about January 15, 1920, and to cover an initial period of not less than sixteen weeks. The letter continued, "If you are available kindly wire at your earliest convenience the minimum compensation you will accept in consideration of the long term of the engagement." The declaration then sets up that two days afterwards, December 5, 1919, plaintiff in reply sent a letter to the defendant wherein he stated that he would want a salary of $100.00 per week and a minimum engagement of twenty-six weeks. And it is further alleged that on the day following, December 6, he received a letter from defendant in reply, in which the defendant stated that it could not see its way clear to give him $35.00 a week in advance of what he had been paid during his former engagement by it, and especially so, since it was prepared to give plaintiff continuous employment so long as his services were satisfactory for practically the whole year of 1920, and further continuing the letter stated: 'If you care to accept the salary of $75.00 per week and expenses, we would be pleased to have you arrange your affairs so that you can reach Denver for territorial conference January 7th at the Brown Palace Hotel.' And it is further alleged that on December 8, plaintiff sent a letter to the defendant accepting defendant's offer of $75.00 per week and expenses, to which the defendant replied on December 10, as follows: 'I have yours of recent date and note

that you accept my offer of $75.00 per week and expenses. I am assembling all of my field men at the Brown Palace Hotel, Denver, Colorado, on January 7th, and without further notification from me, I will expect you to report with the other men at that time"; that afterwards on December 12, plaintiff received a telegram from the defendant, stating that plaintiff's salary and expenses would begin from the time he left home until he returned. The declaration then alleges that plaintiff on December 13 received another letter wherein the defendant stated, among other things: "You continue to ask questions in regard to matters that were fully covered in our original communication, namely, we will pay you $75.00 per week and expenses for a minimum of 36 weeks, providing your services are satisfactory. If you were familiar with business affairs of campaigns you would know that salaries and expenses begin from the time a man leaves home and end upon the day he should return home. " " " If after thinking things over you still decide you wish to come with us and give your whole-hearted time and attention and co-operation to making our campaign in 1920 a success, you will be welcome and I will expect you at Denver on January 7th, without further communications from you. If you decide you cannot work under the new conditions that you will probably meet, I would thank you for a wire immediately." Following receipt of this letter by plaintiff on December 15th he sent defendant a telegram wherein he stated he would report at Denver January 7, at the Brown Palace Hotel.

It is further alleged that plaintiff confiding in the promises of the defendant made arrangements to give the necessary time and services to the defendant and he prepared himself to report to the defendant in Denver on January 7, 1920.

That in making said arrangements and holding himself in readiness to engage in the defendant's services he necessarily terminated certain other employment in which he was engaged, and necessarily declined to sign other contracts which were offered to him by others who desired his services.' And it is then alleged that two days following December 17, 1919, plaintiff received a telegram from the defendant advising him that the campaign had been indefinitely postponed and that it would not require plaintiff's services until later. It is then alleged that from that date plaintiff was ready and willing to perform his services for the defendant, but that the latter prevented him from doing so, and that, by reason of this breach, plaintiff was unable to secure employment for the 26 weeks.

(1) The defendant contends that there was no binding agreement entered into between the parties whereby the defendant agreed to employ plaintiff for a period of 26 weeks; that in its letter of December 13, 1919, it made an offer to employ plaintiff for a period of 26 weeks at $75.00 per week, but that this offer was never accepted by the defendant. That the only way it could be accepted was by plaintiff going to Denver, Colorado on January 7, 1920, and that there is no allegation that plaintiff did go to Denver at that time; that the defendant had a legal right to make its offer of employment on any condition it might see fit and the condition that it imposed was that plaintiff go to Denver at the time specified. We think this is too narrow a construction to be placed on the language as set forth in the declaration. All of the allegations and correspondence set forth must be considered, and when this is done we think there was a binding contract between the parties.

As appears from the allegations of the declaration, plaintiff had worked for the defendant prior to the time in question,- they were not strangers to each other. And on December 3, 1919, the defendant offered to employ the plaintiff for a period of not less than sixteen weeks, beginning about January 15, 1920, and then asked plaintiff to wire defendant the minimum compensation he would accept, taking into consideration the long period of time the defendant had offered to employ plaintiff, viz: sixteen weeks. The plaintiff did not wire the defendant as requested, but two days later sent defendant a letter wherein he stated that he would work for the defendant for One Hundred Dollars ($100.00) per week, provided he was given a minimum engagement of twenty-six weeks. To this letter the defendant replied, wherein it stated it was not willing to give plaintiff twenty-five dollars ($25.00) a week more than it had paid him during his former engagement, but stated it would be willing to pay seventy-five dollars per week and expenses.

Nothing is said in this letter about the period of time, but it is certain that it impliedly accepted the minimum period of twenty-six weeks, because the only objection is made to plaintiffs offer of December 5th, was as to the weekly compensation, and the declaration then alleges that plaintiff wrote the defendant, accepting the seventy-five dollars per week and expenses. This made a binding contract between the parties.

There can be no doubt, but that both parties understood that the employment was to continue for a period of twenty-six weeks, provided the plaintiff's services were satisfactory to the defendant. This is further shown by the fact that

December 8th, two days after plaintiff had accepted the proposition, defendant wrote plaintiff that it had received the letter and noted that plaintiff had accepted its offer of seventy-five dollars per week and expenses, and then stated that plaintiff should be at Denver on January 7th, where defendant was assembling the other men at that time.

Again it is further evidenced that a binding contract had been made between the parties as shown by the writing of defendant's letter of December 13th, wherein the defendant states that the matter had been fully covered in prior correspondence, namely, "He will pay you seventy-five dollars per week and expenses for a minimum of twenty-six weeks, provided your services are satisfactory", and that the defendant there further stated that if plaintiff was not going to work for it to wire defendant to that effect immediately. To this letter the defendant wired that he would report at Denver on January 7th. Two days later the defendant sent a telegram to the plaintiff, advising him that its campaign had been indefinitely postponed, and that he would not require plaintiff's services. This is further evidence that the defendant considered it had already entered into a binding contract.

(2) But the defendant further contends that, even if there was a binding contract, the allegations fail to show that there was a breach of it; that since the contract of employment provided that it should continue so long as plaintiff's services were satisfactory to it, the defendant could, under the law, discharge the plaintiff at any time for any reason or no reason, and that defendant did discharge the plaintiff on December 17, when he advised him that the campaign had been indefinitely postponed.

If we assume that, where a person is employed so long as his services are satisfactory and that, under the law, he may be discharged for any or no reason without incurring any legal liability, this would not affect the case before us because the plaintiff was never discharged - he was not permitted to begin his employment, under the contract, at all. We must decide the case before us and not what might have happened if the plaintiff had gone to Denver and had then been discharged. The allegations here disclose nothing that would indicate that plaintiff's services were satisfactory or otherwise, because no service had been rendered. So that the argument, as made, is a non sequitur.

But counsel for the defendant contend that the legal proposition advanced by them is sustained by the cases of Courier Journal v. Miller, 50 S. W. (Ky.) 47 and Blaisdell v. Lewis, 32 Maine 515.

In the Miller case an action was brought to recover damages for the breach of a contract of employment, beginning March 1st thereafter and to continue so long as his services were satisfactory to defendant. The court there said: "He did not testify as to the time this agency was to continue." It further appeared that before March 1st when he went to begin his work, he was notified that he could not begin until later, and afterwards he was notified that the matter had been indefinitely postponed. The court there said:

> "Appellee (plaintiff) also testified that prior to the notice of postponement, he had incurred some expense in renting a room, hiring a boy and advertising. Under this contract, as alleged and proven by appellee, if true, the appellant could discharge appellee at any time without cause, and there would, from the date of discharge, be no further liability."

This is substantially all that is said on the subject. The question whether a postponement of the time of employment is equivalent to a discharge was in no way considered.

In the Blaisdell case defendant employed plaintiff to do some work without specifying any period of time the services was to cover. Afterwards andbefore the day fixed for the commencement of the work the defendant notified the plaintiff that the matter had been indefinitely postponed. The entire opinion of the court which was orally announced is as follows:

> "An infirmity in this contract is, that it fixed no time during which the plaintiff's services should be rendered to the defendant. Suppose the plaintiff had gone to Hallowell, and tendered his services, there was nothing to prevent the defendant from discharging him at theend of a single day. In such a contract there is no value."

In neither of the two cases was there any definite time of employment fixed. But, in any event, we do not believe that where a contract of employment provides that the period of employment shall cover a specified time, or so long as satisfactory, that one of the parties can relieve itself of liability by indefinitely postponing the date the work is to commence. What such party might do in case such employment were commenced is not involved, and that question is not in the case before us.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

84 - 27916

(3380)

THE SHERWIN-WILLIAMS CO.,
a corporation,

Appellee,

v.

RACHEL-CARTER BRIEFBUILDING CO.,
a corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

231 I.A. 507

Opinion filed Oct. 17, 1923.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff, the payee of a promissory note, brought suit against the defendant, maker, to recover $473.80, being the face amount of the note and interest thereon. There was a trial before the court without a jury and a finding and judgment in favor of plaintiff for the amount of its claim, $471.80, to reverse which the defendant prosecutes this appeal.

The defense interposed was that a few days after the note, by its terms, became due the defendant wrote plaintiff enclosing its check for 50% of the amount due and stating in the letter that it was in financial difficulties and unable to pay its obligations in full but was paying its several creditors by sending each 50% of the amount defendant owed them and further stating that the check to plaintiff was to be accepted as payment in full and that if plaintiff would not receive the check as in full payment to return it at once; that the plaintiff received and retained the check for more than 60 days and that this amounted to an accord and satisfaction. This defense ignores the evidence offered by plaintiff in rebuttal and which was not contradicted in any way to the effect that when plaintiff received the check it took the matter up with defendant and

Opinion filed Dec. 17, 1938.

it was then agreed that plaintiff might hold the check until it could look into the matter and that afterwards plaintiff did so and decided not to accept the check in payment in full and that defendant then requested plaintiff to return the check, which was done. Nor do we think the fact that the check was not returned until a few days after the suit was instituted can affect the result, because plaintiff did not attempt to collect on the check and only retained it by agreement with the defendant.

In this state of the record it is obvious that no judgment could stand except one in favor of plaintiff. The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

(3381a)

118 - 27951

GEORGE E. GUNDLING,

Appellant,

v.

JULE SEEGLITZ AND OTTO E. SEEGLITZ,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

231 I.A. 307

Opinion filed Oct. 17, 1933.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

George E. Gundling, filed his bill of complaint in the Superior Court of Cook County against Jule Seeglitz, Otto E. Seeglitz and others to foreclose a mechanic's lien on certain real estate, claiming that there was due to him an unpaid balance of $350.00, on account of a furnace which he had installed in the premises belonging to Jule Seeglitz. After the issue was made up, it was referred to a Master in Chancery, who took the proofs and found that the furnace which plaintiff had installed, failed to properly heat the defendant's premises as the contract provided, and recommended that complainant's bill be dismissed for want of equity. Objections to this report were filed on behalf of the complainant, and on coming into court before the Chancellor, they were ordered to stand as exceptions and after a hearing the exceptions were overruled, a decree entered and the bill was dismissed at complainant's costs and this appeal follows.

The facts shown by the evidence are - That plaintiff had been in the business of installing furnaces in the City of Chicago for a number of years, and on October 30, 1930, entered

(3381)

into a written agreement with the defendant Otto A. Seeglitz, who is the husband of the defendant Julie Seeglitz, the latter being the owner of certain premises in Chicago, whereby complainant agreed to install a furnace in the defendant's premises at No. 442 St. James Place, Chicago, for $400.00, - $50.00 to be paid upon the signing of the contract and the balance when the work was done. The furnace was guaranteed to heat the building to a comfortable temperature. Shortly after the contract was made, complainant began to install the furnace and the last work seems to have been done by him on November 13, 1920. The furnace did not heat the premises properly and the defendants complained to complainant about the matter and he went to the premises a number of times and endeavored to see that the furnace properly heated the building.

There was testimony offered in the complainant's behalf tending to show that the furnace, if properly supplied with coal, would heat the building to the required temperature. On the contrary a number of witnesses, who lived on the premises, testified that the rooms were cold and uncomfortable, although the furnace was properly supplied with coal. On this issue the master found in favor of the defendant's contention, viz. that the furnace failed to heat the premises, and the master's finding was confirmed by the chancellor, and this finding, complainant contends, is against the manifest weight of the evidence. We are clearly of the opinion that the finding of the master is not only not against the manifest weight of the evidence, but is in accordance with the weight of the evidence.

Complainant seems to make another point that if as defendants contend, the furnace did not heat the premises, it was their duty to obtain experts to have it so changed or altered

that it would properly heat the premises and any expense incurred by them in this respect, might be recouped from the purchase price. It is obvious that no such obligation was placed on the defendants in this case. Defendants expressly contend that they never accepted the furnace and the evidence sustains this contention, and in their supplemental answer they allege that the furnace may be removed by the complainant at any time and the evidence shows that they notified him to this effect. The furnace never having been accepted by the defendants under the law, the complainant is not entitled to recover. Underwood, et al v. Rolf, 173 Ill. 488.

The decree of the Superior Court of Cook County is affirmed.

DECREE AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

(3382)

47 - 27875

CITY OF CHICAGO,
Appellant,

v.

JOHN McERLANE,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 607

Opinion filed Oct. 17, '23.

MR. JUSTICE THOMSON delivered the opinion of the court.

The defendant McErlane, being the owner and operator of a public taxicab in the City of Chicago, was arrested and charged with operating it in violation of one of the ordinances of the City, requiring that "every automobile, autocar, or other similar vehicle, licensed under the provisions of this article, shall have the name of the owner thereof plainly painted in letters at least two inches in length, in the center of the main panel of the rear door of said vehicle." Issue was duly joined on this charge and the matter was submitted to a jury, resulting in a verdict of not guilty. The City of Chicago prayed an appeal to the Supreme Court of Illinois, from the judgment entered on that verdict and that court has transferred the case to this court. No brief has been filed by the defendant. We shall confine ourselves to a consideration of those questions urged by the City of Chicago in its brief filed in the Supreme Court, of which this court may properly take cognizance.

It appears from the evidence that the taxicab, owned and operated by the defendant, contained the words "Harrison Hotel Taxicab Service" at about the center of the main panel of the rear door on each side. At the top of the panel on each side appeared

Opinion Filed Oct. 17, '35.

the name of the owner, "J. McFarlane." In the course of the trial the court remarked that he considered this a substantial compliance with the ordinance. At that point of the proceedings, counsel for the City was trying the case on the theory that the defendant's name was on the panel at a point other than its center. In our opinion that theory was untenable as the trial court intimated. Later it was urged that other matter appeared on the panel, and this at its center which was not a substantial compliance with the ordinance. On that issue the court instructed the jury.

In connection with the charge to the jury, the court instructed them that "the ordinance in question does not state that no name but one shall be on the cab in question. In this case, even though you should find that some other name besides his own appears on the cab in question, that would not warrant you in finding him guilty of a violation of section 2 of this ordinance. Section 3 of this ordinance provides merely that every automobile, automar or other similar vehicle licensed under the provisions of this article shall have the name of the owner thereof plainly painted in letters at least two inches in length in the center of the main panel of the rear door of said vehicle." In our opinion such an instruction was wrong and should not have been given. It was obviously the intention of the City Council, as the law making body of the City, to provide, by this ordinance, that the owner of a public taximob or other similar vehicle licensed to operate on the streets of the City, should contain the name of the owner in plain letters on the center of the panel of the rear door, so that one, having occasion to know who was responsible for its operation, might ascertain that fact,- and this at a glance, if necessary. It may hardly be said to be a substantial compliance with the ordinance to have something other than the name of the owner appearing

at the center of the panel, even though the name of the owner appears at some other part of the panel. It appears from the evidence that McErlane was standing in front of the Harrison Hotel with his taxicab at the time he was arrested and presumably, from the evidence, he was engaged in their taxicab service, but, in our opinion, that does not alter the situation. The instructions complained of were, to say the least, misleading on the issue of whether the lettering on the panel of the defendant's taxicab amounted to a compliance with the requirements of the ordinance.

Over objections of counsel for the plaintiff, the trial court permitted the defendant to testify that he had talked with members of the Public Vehicle License Commission of the City of Chicago, who had told him to place his name at the point where it appeared on the panels of the car. While such evidence was inadmissible on the issue of whether the defendant was operating his taxicab in violation of the ordinance, it might be proper to receive and consider it solely on the question of the defendant's good faith and in connection with the amount which he might be required to pay, as a fine, in case he were found guilty. If received, the evidence should have been restricted to that issue by proper instructions.

For the reasons stated the judgment of the Municipal Court is reversed and the cause is remanded to that court.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

(3383)

56 - 27888

W. E. MEYERS, doing business as W. E. MEYERS & CO.,

Plaintiff in Error,

v.

AMANDA ACKERLUND and LEANDER ACKERLUND,

Defendants in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

231 I. A. 507

Opinion filed Oct. 17, 1923.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff brought this action against the defendants for the recovery of commissions alleged to have been earned by him as a real estate broker in connection with the sale of a certain piece of property belonging to the defendants. The appearance of both the defendants was duly filed, together with a demand for a trial by jury, and later the defendants filed their affidavit of merits which was signed and sworn to by their attorney. About five months after the filing of the affidavit of merits, the attorney representing the defendants, after proper notice obtained leave of court to withdraw his appearance, and an order was duly entered to that effect. Nearly a year after that, the cause was reached in its regular order for trial, but the defendants were not present nor were they represented. The plaintiff being in court with his witnesses and ready for trial, a jury was called and the plaintiff presented his evidence, resulting in a verdict in his favor in the sum of $625.00, on which judgment was duly entered on January 3, 1921.

On March 11, 1921, more than sixty days after the

(3383)

entering of judgment, the defendant, Amanda Ackerlund, filed a petition or affidavit on behalf of herself and the other defendant who was her husband, in which she represented that she had retained a lawyer, other than the one who had originally filed her appearance in this case, who was to represent her in the trial of the case, and that the latter had told her he would advise her as to the time and place of the trial. She further set forth in this petition that she had not been informed that the case was reached for trial on January 4, 1921, and that her lawyer did not appear in court in defense of the case at that time and that judgment had been entered against her and her husband; that she had no means of knowing when the case was going to be reached and had relied upon the assurance of her attorney that he would watch the case and let her know when it was to be reached, and that she received no notice in that regard from him and for that reason was not in court when the case was reached. The remainder of her petition set forth the defenses which she alleged she had to plaintiff's claim. Upon the filing of this petition and over the plaintiff's objection, the court entered an order opening the judgment, directing that it stand as security and that execution be stayed until further order of the court.

Later an order was entered vacating the judgment and when the case came on for further proceedings the plaintiff announced that he had nothing further to present and that he elected to stand by the record as it had been made. Whereupon, the court dismissed the plaintiff's suit, for want of prosecution, and entered judgment in favor of the defendant as in a case of non-suit. By this writ of error the plaintiff seeks to reverse this judgment.

Section 21 of the Municipal Court Act provides that "If no motion to vacate, set aside or modify the entry of such judgment, order or decree, shall be entered within 30 days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting on appeal or writ of error, or by a bill in equity, or by a petition to said Municipal Court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity." It is elemental that to be sufficient to cause a judgment to be vacated and set aside, after the term, the bill in equity must set forth facts constituting a meritorious defense and also facts showing diligence on the part of the defendant. Each of these elements is as necessary as the other. The petition filed by the defendant, Mrs. Ackerlund, in this case, not only fails to show diligence on her part but demonstrates a lack of it. No question is raised as to the regularity of the withdrawal of the appearance of the attorney who represented the defendants in the case at bar originally. From the petition it appears that after the withdrawal of the attorney, Mrs. Ackerlund arranged to have another lawyer represent her and her husband in this case. For some reason which is not disclosed, he failed to do so. It is also elemental that they are bound by his negligence.

It furthermore appears from the record that on the hearing which was had upon the filing of this petition to vacate the judgment, the lawyer who had originally represented the defendants in this case, was called as a witness and was interrogated by the court, and, among other things, he stated that sometime after he had withdrawn from the case and had advised Mrs. Ackerlund that he

would not represent her, he happened one day to be looking over the record of judgments in the Municipal Court, as published in the Municipal Court Record, and he noticed that judgment had been entered against the defendants in this case. Thereupon, he called Mrs. Ackerlund up and told her that judgment had been entered and advised her to take the matter up with her present lawyer, right away. Thereupon Mrs. Ackerlund told him he was a liar and that no judgment had been entered and that the matter was being taken care of. This evidence is not disputed and it would seem to be quite clear that nothing whatever was shown to excuse the negligence of the defendants, both his failing to provide for proper representation in this case before judgment, and in failing to make any effort to have the judgment vacated, until more than 60 days had gone by, in spite of the fact that one of the defendants had been advised that judgment had been entered, the day after it had been so entered.

The trial court erred in vacating the judgment which had been entered for the plaintiff. The judgment appealed from is, therefore, reversed and judgment for the plaintiff is entered in this court for $635.00, with interest from January 3, 1951, the date of the original judgment.

JUDGMENT REVERSED AND JUDGMENT HERE.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

(3384)

70 - 27902

MAX ADAMOWSKI,

Appellee,

v.

AUGUST G. URBANSKI and OTTO G. RIEDEL,

Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I.A. 308

Opinion filed Oct. 17, 1923.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendants seek to reverse a judgment for the sum of $300.00, recovered by the plaintiff in an action based on a claim for real estate commissions.

The plaintiff, Adamowski, was in the real estate business. He had an assistant named, Majewski. Title to the property in question was in Urbanski. It would seem from the testimony in the record that Riedel was a contractor who had built a number of bungalows on Urbanski's property, and among them was one on the lot in question. A Mr. and Mrs. Burkhardt became the purchasers of the property, taking title from Urbanski, closing the deal through a real estate agent named Rinkley. It is the position of the plaintiff that he was the means of interesting the Burkhardts in this property and that he is entitled to his commission. Originally he brought his action against Urbanski and Riedel and also the Burkhardts but later the two Burkhardts were dismissed out of the case.

(3384)

Two questions are involved on this appeal. The first relates to the right of the plaintiff to the commission which he claims and the second has to do with the question of whether the two defendants against whom the judgment was rendered, are jointly liable.

From the testimony it appears that in July, 1921, the plaintiff's assistant, Wojewski, was in the neighborhood of the property, which was ultimately purchased by the Borkhardts and at that time he had a talk with the defendant, Riedel, regarding the piece of property in question and also another piece; Riedel saying that he had two buildings on these pieces of property, under construction, and he asked the plaintiff's assistant to try and sell them for him, giving him all the particulars, relating, among other things, to the price and the amount of cash that would be required from a purchaser, and in this conversation Riedel said that he was the owner of these buildings. Following this, the plaintiff's assistant duly listed the properties in the plaintiff's office.

In the month of September, the plaintiff, Adamowski, met the defendant Urbanski and the latter at that time gave the plaintiff a memorandum of these same two pieces of property, requesting him to make a sale of them if possible. When the plaintiff reached his office he gave his assistant a memorandum of these properties and the assistant then told him that he had listed these properties previously. Upon the plaintiff asking his assistant where he got the properties he stated that he got them from Riedel. The plaintiff testified that when Urbanski listed the property in question with him, he placed a price of $7000.00 on it.

On October 4, 1921, Mr. and Mrs. Burkhardt went to the plaintiffs office in search of a piece of property which would suit them. Several pieces were submitted, and among others the property in question, the plaintiff's assistant going out to the property and showing it to the Burkhardts. It was apparently what they were looking for and they were told what the price was and they then asked the plaintiff's assistant to get in touch with the owner and get the rock bottom price, and he stated he would do so. The Burkhardts explained that they were considering another piece of property and would be obliged to make some definite answer to the real estate man who was handling it, that evening and they wanted to get the bottom price on the property in question before that time, and plaintiff's assistant stated that he would try to get it for them. It appears from the evidence that he made a number of attempts that afternoon to reach the defendant, Riedel, but without success. That evening the Burkhardts went to the other real estate man above referred to, Mr. Hinkley, and stated that they wanted to "cancel that other piece of property", and he asked why and they explained that they had an opportunity to buy the property in question and Hinkley wanted to know at what price it had been offered to them and they told him and he stated he had the property listed at a lower figure. The next morning the Burkhardts visited the property in question with Hinkley and the defendant, Riedel, after which they returned to Hinkley's office and signed the contract to purchase the property at $6800.00.

It further appears from the evidence that in the meantime on the evening of the day the Burkhardts visited this property with the plaintiff's assistant, the plaintiff reached the defendant Riedel over the telephone and told him about the transaction involving the possible purchase of the property by the

Burkhardts and asked him whether he would reduce the price and the plaintiff testified that Riedel said that if "he could get $4500.00 in cash that he had in there, he thought he could reduce the price but he would have to take it up with Mr. Urbanski's office first." The plaintiff testified that Riedel told him to get the Burkhardts over to his office that night and that later the defendant, Riedel called him up and stated that he was over at Hinkley's office and that the Burkhardts were there.

After the plaintiff had closed his case the defendant Riedel took the stand and in the course of his testimony stated that sometime in the month of July, he told the plaintiff or his assistant that he might list these buildings, one being the property in question, and he gave him a price of $69000.00, and that later he listed the property with Hinkley. At this time there was introduced in evidence a letter from Hinkley to the defendant Riedel, dated October 3, 1961, informing him that "We have submitted your bungalows " " " to the following prospective buyers", naming a number of persons, one of whom was "A. Burkhardt", presumably the same party who ultimately purchased the property. When Burkhardt was on the stand testifying for the plaintiff, he was asked whether the property in question had ever been submitted to him before he called at the plaintiff's office, and he said it had not.

On this conflicting evidence we are of the opinion that the trial court was justified in concluding that the plaintiff was entitled to his commission. At least, we would not be warranted in saying that a finding to that effect is against the manifest weight of the evidence. The testimony submitted by the plaintiff tended to show that both Urbanski

and Riedel listed this property with the plaintiff and the plaintiff first showed it to Burkhardt and was endeavoring to get in touch with Riedel and get the rock bottom price, when Burkhardt saw Hinkley in connection with another piece of property he had been considering, and then Hinkley learned that the reason that deal was being discontinued was that Burkhardt had an opportunity to purchase the property in question, whereupon Hinkley jumped in and closed the deal.

On the question of whether the evidence is such as to support a joint judgment against both Urbanski and Riedel, we are of the opinion that it is. The title to the property in question may have been in Urbanski but it would seem from the testimony submitted in behalf of the plaintiff, that the defendant Riedel, had an interest in this property. Counsel for the defendants points out that Burkhardt testified that he understood Riedel was the contractor. Although Riedel took the stand, he did not deny the testimony of the plaintiff's assistant to the effect that he had represented himself to be the owner and while that might not be sufficient to bind him under all the circumstances, to pay the commission, there is sufficient in the testimony, in our judgment, to warrant the conclusion that he was jointly interested in this property, with Urbanski, and in its improvement and sale. It is significant that he told the plaintiff when the latter reached him over the telephone, on the evening of the day the plaintiff's office had introduced the Burkhardts to the property, that if he (Riedel) "could get $4500.00 in cash that he had in there he thought he could reduce the price but that he would have to take it up with Mr. Urbanski's office first."

The law which applies to the right of a real estate agent to his commission, and to the question of who may be liable

for these commissions, is well settled, but it is often difficult to comprehend the facts presented in controversies of this kind, that arise between brokers, owners and other interested parties. On all the facts presented by this record, which we have set forth rather fully, it is our opinion that the judgment for the plaintiff against both the defendants was warranted. The judgment for the plaintiff is therefore affirmed.

JUDGMENT AFFIRMED.

TAYLOR, P.J. and O'CONNOR, J. CONCUR.

(33852)

38 - 27931

HARRY D. PARMELEE,

Appellant,

v.

J. A. MAC FARLANE & SON, Doing business under the name of Hotel Kenmore,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I.A. 608

Opinion filed Oct. 17, 1923.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff brought an action of replevin against the defendants for the purpose of securing possession of certain of his personal property, consisting, for the most part, of wearing apparel, dishes and cooking utensils, which were being held by the latter, who claimed an inn-keepers lien, to secure a balance due them from the plaintiff on the rental of rooms which he and his wife had been occupying. The only issue considered in the trial court and the only one involved on this appeal, has to do with the question of whether the relation existing between the defendants and the plaintiff was that of innkeeper and guest. The trial court, who heard the evidence without a jury, held that the defendants were innkeepers and that the relation of innkeepers and guest had existed between the parties and that, therefore, the defendants were entitled to an innkeepers lien on the property in question. The property, having been turned over to the plaintiff, the judgment was to the effect that the plaintiff pay the defendants $77.60, within 30 days or in default thereof, that a writ of returno habendo issue for the property replevied. To reverse that judgment the plaintiff has perfected this appeal.

Opinion Filed Dec. 17, 1888.

It appears from the evidence that the plaintiff was a watch and clock maker and that he had resided in Chicago continuously for 16 years. He saw an advertisement in a Chicago newspaper advertising furnished apartments for rent - these being the apartments of the defendants. The so-called Hotel Kenmore consists of a number of apartment buildings, located at 4618 - 4638 Kenmore avenue, in the City of Chicago, and also at 4640 Kenmore Avenue. Between 4618 and 4640 Kenmore avenue, there are a number of other buildings, not connected in any way with the establishment of the defendants. When the plaintiff answered the advertisement and went to the premises of the defendants, he asked the clerk in charge if they had any furnished apartments to rent and he stated they had. As a result of this visit, the plaintiff rented a three room furnished apartment in the building at 4640 Kenmore avenue, for a period of three months at a rental of $75.00 per month. The three rooms consisted of dining room, bed room and kitchen. The plaintiffs took all their meals in their apartment and did their own cooking and also did the work of cleaning the apartment. No restaurant or cafe was maintained on the premises of the defendants.

It further appears from the evidence that the plaintiff paid the first two months' rent but was unable to pay that of the last month. The plaintiff testified that he told the clerk that he was out of a position and would be obliged to get a cheaper place in which to live; that he was willing to sign a note for the last month's rent, and pay the amount as soon as he could get on his feet. Plaintiff prepared to leave and had his personal effects on a wagon in the alley, when employees of the defendants seized them and took them back into the building and refused to turn them over to the plaintiff.

The evidence further shows that a register was kept in the hotel and the plaintiff registered at the time he moved in. A copy of the innkeepers' law was posted on the inside of the entrance door of the plaintiff's apartment.

It would seem clear from the foregoing, that the plaintiff was not a transient guest at the hotel of the defendants. He was a permanent resident of the city and what he contracted for was not the accommodations of an innkeeper but a furnished apartment, for a definite period of three months. A specific agreement was entered into between the parties for the furnished apartment for the definite term, at a price of $75.00 per month. None of the circumstances are present which go to make up the relation of innkeeper and guest, and in our opinion the trial court erred in holding that such relationship existed. Vigeant v. Nelson, 140 Ill. App. 644; Clifford v. Stafford, 145 Ill. App. 347; Moon v. Varian, 147 Ill. App. 383; Grey v. Grand Avenue Hotel Co. 146 Ill. App. 604; Miles v. International Hotel Co., 167 Ill. App. 440.

For the foregoing reasons, the judgment of the Municipal Court is reversed.

JUDGMENT REVERSED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

(3360)

133 - 27967

EMILY UPTON BRACH,

Appellant,

v.

STEPHEN R. SWARTHOUT, et al,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

231 I.A. 608

Opinion filed Oct. 17, 1933.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the complainant, Mrs. Brach, seeks to reverse a decree of the Superior Court of Cook County, which sustained the demurrer filed to her bill, by the defendants, and dismissed her bill for want of equity.

Mrs. Brach was the owner of two pieces of real estate, both improved with large apartment buildings. For convenience, we shall refer to these pieces of property as parcels A. and B. Sometime in the spring of 1931, Mrs. Brach made a contract with one Williams, under the terms of which she agreed to sell, and he agreed to buy, Parcel A. for a total consideration of $345,000.00, subject to an encumbrance, secured by a first mortgage, amounting to $122,000.00, and another encumbrance which was to be secured by a second mortgage, to be placed on the property by Mrs. Brach, in the sum of $75,000.00. The contract provided that the balance of the consideration was to be made by Williams paying Mrs. Brach $20,000.00 in cash and $25,000.00 in purchase money notes, to be secured by William's trust deed covering the property. This contract of purchase and sale provided that, as part of the consideration for Mrs. Brach entering into the contract, Williams enter-

took and agreed to execute a management contract, at the time the deal was closed and the warranty deed was delivered to Williams, under and by the terms of which management contract Williams was to constitute one Upton as his agent to manage the building and the property, collect the rents and so on.

About the same time, Mrs. Brach made a similar contract with one Blair, covering Parcel B., under the terms of which she agreed to sell and Blair agreed to buy, that property at a total consideration of $232,500.00, subject to a first encumbrance of $142,500 and a second encumbrance, to be placed upon the property by Mrs. Brach of $75,000.00, and the balance of $20,000.00 to be paid by Blair in cash.

On June 21, 1931, these deals were consumated. On that date, Williams assigned his interest in the contract, covering Parcel A., to Blair and Blair assigned his interest in the contract covering Parcel B., to one Powers. At the same time Mrs. Brach executed and delivered her warranty deeds to the last named parties, one covering Parcel A to Blair and the other, covering Parcel B. to Powers. The respective grantees thereupon executed the so-called management or agency contracts, referred to in the warranty deeds, under and by virtue of which, they appointed Upton as their agent to manage the buildings located on these two properties. Under these contracts, Upton's agency was to extend from July 1, 1931, to April 30, 1933, and thereafter until terminated by 30 days notice by either party. On the reverse side of each of the agency contracts there was a power of attorney, signed by the aforementioned grantees of these two properties, authorizing the said Upton, as agent during the existence of the agency created by the contract, to execute, renew and terminate the leases of said premises, or any part thereof, in the name of

the owner and on his behalf, for such rentals and periods, and for such terms and conditions as might seem advisable to the agent, and also authorizing him to prosecute suits for rent or possession of the premises and to compromise claims for rent and possession.

On October 27, 1931, Blair and Powers conveyed these two properties to the defendant, Swarthout, and in each case the deeds of conveyance were specifically made subject to the management contracts theretofore entered into by the respective parties in these deeds, with Upton. After thus acquiring title to the properties, Swarthout claimed the right of terminating the agency contracts, and he notified Upton of such termination, secured possession of the leases covering the premises in the two parcels, and appointed the other defendant, Matteson & Conrad, Inc., to manage the properties, and that corporation proceeded to assume their management. Thereupon the complainant, Mrs. Brach, filed her bill in equity, setting up the foregoing facts and praying that the leases of the premises in these buildings be returned by the defendant, Swarthout to Upton; that a receiver be appointed and that the defendants be enjoined from assuming or attempting to assume the management of the properties, and from interfering with their management by Upton. The defendants filed a general demurrer to this bill of complainant, and after a hearing on the issues thereby raised, the chancellor sustained the demurrer and entered a decree, dismissing the bill of complainant for want of equity, to reverse which, she has perfected this appeal.

It was alleged by the complainant in her bill, in connection with the averments referring to the agreement of her grantees to execute the agency contracts, constituting Upton the agent of these properties, that "it was the intention of the parties that said

premises should be managed by said Upton, to secure proper management and to keep said premises in good and rentable condition, and rented, so that the income therefrom may be sufficient to pay the encumbrances, both principal and interest, on said premises, as the same might respectively mature and especially to pay the encumbrance evidenced by the principal notes to be executed by the complainant under the terms of said contract (of sale to be executed by her) so as to protect and indemnify the complainant against personal liability thereunder." Complainant further set forth in her bill that the agency contracts in question, each included a paragraph reading as follows:

> "It is understood and agreed that the owner has acquired title to the above described premises by deed from Emily Upton Brach and Edwin J. Brach, her husband, bearing even date herewith, and as a part of the consideration for the execution and delivery of said deed the said owner has agreed to enter into the above and foregoing agency contract to assure proper management of said building so as to enable the payment of principal and interest under encumbrances on said premises for which said Emily Upton Brach is liable."

Most of this contract consisted of a printed form, but the foregoing paragraph was typewritten.

Complainant further alleged in her bill of complaint that in order to protect her and indemnify her against personal liability or any deficiency which might arise under foreclosure proceedings, she was entitled to have the management of the property in question, continued by Upton, pursuant to the terms of the management contracts, and "that she is informed and believes and so avers and alleges the fact to be, that said Robert W. Blair, Richard Powers and Stephen A. Swarthout are, and each of them is, insolvent."

So far as the agency contracts with Upton referred to

the disposition to be made by him of the income from these properties, which he was authorized by the contracts to collect, in the way of rentals, they provided that his care and management of the premises was to include the employment of labor and purchase of supplies and materials necessary for proper operation and maintenance, ordering and supervising ordinary repairs and decorating, and also when requested in writing by the owner, the insuring of the premises and payment of taxes and assessments thereon; and the contracts further provided that "The Agent shall render to the Owner at regular reasonable intervals to be designated by the owner, detailed statements with vouchers for the disbursements, and remittance for collections, less disbursements made, indebtedness incurred under the authority hereof, and any commissions or other sums due the agent."

In support of the decree appealed from, the defendants contend that the allegation contained in the bill to the effect that "it was the intention of the parties that said premises should be managed by said Upton to assure proper management and to keep said premises in good and rentable condition and rented so that the income therefrom might be sufficient to pay the encumbrances, both principal and interest, on said premises as the same might respectively mature and especially to pay the encumbrance evidenced by the principal notes to be executed by the complainant under the terms of said contract so as to protect and indemnify complainant against personal liability thereunder," is merely a conclusion of the pleader andfurther that it does not find support in an examination of the documents involved. In our opinion, that contention is not sound.

The contracts of complainant with her grantees and the deeds from complainant to her grantees, those from the latter to defendant Swarthout, and the so-called agency contracts, should all be construed together. Kelsey v. Klausen, 257 Ill. 403; Wilson v. Davis, 110 Ill. 378. In the contracts executed by the complainant with her grantees, it was provided that the agency contracts were to be entered into as a special consideration for the execution of the contracts by complainant and of trust deeds and promissory notes in connection with second mortgages "and for the purpose of assuring complainant" as the bill alleges, "the proper management of said real estate so that the same should be kept in good and rentable condition and repair, and rented, so that the income thereof might be sufficient to pay and discharge the encumbrances upon said premises as and when the same should mature, so that by the payment thereof complainant might be relieved from personal liability for the payment of" the second mortgage notes to be executed by her. We have heretofore set forth the material provisions of the agency contracts. These contracts were duly recorded, a few days after they were executed. The warranty deeds from complainant's grantees to defendant Swarthout were, the bill alleges, "by recital therein, expressly made subject" to the said contracts. These management or agency contracts specifically set forth that "it is understood and agreed," that "as a part of the consideration for the execution and delivery" of the warranty deeds from complainant to her grantees, the latter have agreed to enter into the agency contracts, "to assure the proper management of said buildings, so as to enable the payment of the encumbrances for which complainant was liable. We are unable to agree with the contention of defendants that the agency contracts

contain provisions inconsistent with the recitation just referred to. It was not necessary that the agent named in the management or agency contracts should or might apply the rents to the payment of the encumbrances as and when they matured, or that he was to allow the rents to accumulate and constitute a sinking fund for the purpose of amortizing the second mortgage obligations, to make the contract consistent with the provisions of the typewritten paragraph.

Under the terms of the agency contracts and the powers of attorney executed in connection therewith, it was the duty of the agent to procure tenants, negotiate leases, keep the premises rented, "for such rentals and periods and upon such terms and conditions as may seem advisable to the agent"; to sue for rent or possession, and to compromise claims for rent or possession, and to care for and manage the premises generally, employing the necessary labor,- and all this, as recited in the contract "to assure the proper management" of the premises. It seems quite clear that if all these things were done properly and by a capable agent, it "would enable the payment of" the encumbrances, as the contracts recited was the object of the "proper management" of the premises, thus provided for, even though it was not provided that the agent was to pay the encumbrances directly out of the rents but was to remit the net rentals to the owners from time to time.

It was certainly in the interest of the complainant that these properties be managed by a capable agent in whom she had confidence. The agent passed on the desirability of all tenants, and under the power of attorney and agency contract, he fixed the lengths of the terms of the leases and the amounts of the rentals. These matters affected vitally the "proper management" of the premises, and if the management was proper it

would materially tend to "enable the payment of the encumbrances."

The execution of these management or agency contracts, having been a part of the consideration for the conveyances from complainant to her grantees as specifically set forth in the contracts themselves, which were later recorded, and the conveyances by such grantees to the defendant Swarthout, having been made expressly subject to these contracts, our opinion is that the complainant had the right to the relief prayed for in her bill of complaint. The situation presented here, so far as the agency contract and the power of attorney accompanying it are concerned, is quite similar to that involved in Rider v. Rider, 114 Ill. App. 302, in which case this court held that the defendant should be enjoined from her attempt to cancel her contract and revoke her power of attorney.

The defendant Swarthout, having acquired the property with notice of the agency or management contracts, and by deeds which were expressly made subject to those contracts, it of course follows that complainant would have the same rights as against him, under them, as she would have against his grantors. Charin v. Dougharty, 185 Ill. App. 426.

For the reasons stated the decree of the Superior Court is reversed and the cause is remanded to that court.

DECREE REVERSED AND CAUSE REMANDED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

(3387)

149 - 27984

R. E. ABBOTT AND T. C. IRWIN, doing business as Abbott & Irwin Coal Company,

Appellants,

v.

JOSEPH A. KRUG, doing business as Krug Brothers,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I.A. 308

Opinion filed Oct. 17, 1923.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiffs, doing business as the Abbott & Irwin Coal Company, brought this contract action in the Municipal Court of Chicago, against the defendant, Krug, a retail coal dealer, to recover a balance alleged to be due them on the sale of 13 cars of coal, under the terms of a contract between the parties, at the contract price of $5.50 per ton. The total amount alleged to be due is $3009.03. The position of the defendant as set forth in his affidavit of merits was that the coal shipped was below grade. The contract called for fifth and sixth vein indiana run of mine coal, and the defendant contended that the coal shipped was not the quality contracted for, but was, for the most part, screenings. The defendant admitted being in the plaintiffs' debt to the extent of the market value of the coal received, of that quality, which was stated to be $1265.57. Issues having been joined by these pleadings the court entered judgment in favor of the plaintiffs for the sum of $1765.57, thus admitted to be due, and the record shows the payment of that amount to the plaintiffs by the defendant, in open court, and acknowledgment by the plaintiffs of thepayment of the judgment. The issues involving the

(533 / 72)

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balance of the plaintiffs' claim were submitted to a jury, resulting in a verdict for the defendant. Judgment followed accordingly, to reverse which, the plaintiffs have perfected this appeal.

There is some argument in the briefs on the question of whether the contract, on which the plaintiffs based their action, was ever concluded between the parties. It would seem to be clear from the evidence in the record that the contract came to be in full force and effect. That it was executed by the defendant is admitted and likewise, that the plaintiffs made shipments under it andthe defendant received these shipments and remitted to the plaintiffs in full payment of at least one of them.

Beyond the question as to whether the contract in question was consummated,athe case went to the jury, there were two issues involved. The first had to do with the question of whether the coal shipped was of the quality called for by the contract, in which case the plaintiffs would be entitled to the contract price. The second involved the question of whether, in case the jury concluded that the coal shipped was not of the quality called for by the contract, the amounts which the defendant had paid to the plaintiffs represented the market value of the coal received by the defendant, as the latter alleged was the case, in his pleadings.

It is the position of the plaintiffs that the finding of the jury on the first issue was against the manifest weight of the evidence, and that there is no support of the verdict, on the second issue, inasmuch as the defendant failed to show by his evidence what the market value was, on the dates of the various shipments, of coal of the quality which the defendant

claimed the shipments consistedof.

We have carefully considered all of the evidence as we find it in the record and, in our opinion, such evidence as may be said to support the verdict is quite unsatisfactory on both of the issues referred to. There is some evidence in the record on the question of the market value of screenings, covering the period of these shipments, but it is not what it should be to properly support the defendant's case. But, we would not be inclined to disturb the verdict on that ground if we were satisfied with the evidence we find in the record on the other issue, namely, the question of whether the coal, constituting these thirteen shipments, was mine run coal as called for under the contract. Much of the evidence on that issue, as we read it in the record, supporting the defendant's contention, is not convincing.

On the question of the market value, the defendant started to submit testimony covering the date of each shipment, when the trial court interrupted and asked the witness whether the market value varied over the period in question, which covered parts of the months of September, October and November, 1920, and he replied that it varied to the extent of about $3.00, the minimum being in the neighborhood of $2.00 and the maximum being in the neighborhood of $5.00. A variation to that extent, with such a minimum and maximum, is a material variation. The witness does not seem to have been interrogated further and there is no testimony as to what the market value was, on the various dates involved, with the exception of the first two or three.

We hold, therefore, that there is not sufficient testimony in the record to support the verdict for the defendant, involving as it does a finding that the defendant's obligation was

merely to pay the market value of screenings, and that the payments he had made, met that obligation. As the cause is to be remanded for another trial, we shall not comment on the merits of the other issue, so far as they are indicated by the evidence we find in the record.

The judgment of the Municipal Court is reversed and the cause is remanded to that court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR, P. J. AND O'CONNOR, J. CONCUR.

(338 I.A.)

160 - 27995

JAMES PERCIVAL PIO,

Appellee,

v.

M. V. MARTIN,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 608

Opinion filed Oct. 17, 1933

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Pio, took judgment by confession against the defendant Martin, on a judgment note for $[illegible].00 drawn by Martin to the order of "myself" and duly endorsed, the amount of the judgment being $200.00, including attorney's fees and costs. Judgment was entered on October 18, 1931. On April 7, 1933, the defendant made a motion to vacate the judgment, which motion was denied. On April 26, 1933, the defendant presented a petition under section 21 of the Municipal Court Act, in which he again sought to have the judgment by confession vacated, and on the latter date the court entered an order denying the prayer of the petitioner. By this appeal the defendant seeks to reverse that order.

By his petition the defendant represented that the note in question was given to one Singer, who represented that he was arranging to have lawyers contest the validity of a certain section of the Banking Act of Illinois; that Singer represented that in order to succeed in that litigation it was considered necessary to employ a certain lawyer who has named (not the plaintiff), who represented a good many parties who were interested

in having the law in question declared invalid; that Singer made a number of further representations, which need not be outlined here. These representations had to do with the defenses claimed by the defendant Martin, to any suit brought on the note. From further allegations made by the defendant in his petition, it appears that after he had given the note in question to Singer, a suit had been started in the name of some forty-six complainants, including this defendant, against the Attorney General, by the plaintiff and the other lawyer who had been referred to by Singer, and that as a result of this litigation the Supreme Court held the statute in question to be unconstitutional. It further appears from the allegations in the petition that some six months after the termination of the litigation above referred to, the plaintiff, being one of the attorneys of record for the complainants in that litigation, secured the judgment involved in the case at bar. The defendant further set forth in his petition that immediately after the entering of the judgment by confession, the plaintiff called at the office of the defendant and that the plaintiff repeatedly called at said office subsequently, consulting with the defendant in regard to a settlement of this judgment and that the defendant refused to pay the plaintiff any sum whatever on the judgment, and that subsequently, the plaintiff cited the defendant into the debtors court, being a branch of the Municipal Court of Chicago. The defendant then proceeds to allege in his petition that the relation of attorney and client existed between him and the plaintiff, and existed up to about January 1, 1923, when the defendant refused to pay the note or the judgment and "that because of the several promises and understandings with reference to the return of the said note as understood by the defendant from the said plaintiff who had been advising the defendant

as attorney for him, this defendant took no steps to set aside said judgment, (and) he did not believe said judgment was effective until he was notified to appear with reference to the payment of said judgment," in the month of January, 1933; that he consulted another lawyer, being the attorney representing the defendant in the case at bar, during the latter month, with reference to the case and that the latter lawyer appeared in court for the defendant in this case on January 19, 1933.

The defendant contends that his petition set forth facts sufficient to warrant the vacating of the plaintiff's judgment, under the provisions of Section 21 of the Municipal Court Act. It is a general rule that a judgment by confession may be set aside after the term, upon a proper showing, as a court of law, after the term, exercises equitable control over such judgments. Kloeckner v. Schafer, 110 Ill. App. 391. In our opinion the court did not err in denying the petition, whether it be considered as directed to the general jurisdiction of the court or as having been presented under Section 72. We are inclined to the opinion, from the facts alleged in the petition, that the defendant did not have a meritorious defense to any suit on the note. Further, there is nothing presented which can be said to excuse the failure of the defendant to present his motion to have the judgment vacated, promptly, or at least within 30 days after it had been entered. The defendant does not allege in his petition, as a fact, that the plaintiff did or said anything which led him to delay action. On the contrary, the defendant states that he was served with an execution on the judgment, four days after the judgment was entered and "that since said date the said plaintiff has repeatedly called," at the defendant's office and talked with him about

settling the matter, demanding payment and even citing defendant into the debtor's court.

For the reasons stated we are of the opinion that the trial court did not err in denying the petition and, therefore, the order of the Municipal Court appealed from, is affirmed.

ORDER AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

(3393a)

103 - 28379

MIDLAND OPERATING COMPANY, an Arizona corporation, for use of Midland Investment Company, a corporation,
Appellee,

vs.

MIDLAND CASUALTY COMPANY, a Wisconsin corporation, formerly named Badger Casualty Company,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

2311.A. 609

STATEMENT BY THE COURT. This action in assumpsit, commenced on July 21, 1919, has been tried twice. On the first trial before a jury in the Superior Court in December, 1920, much evidence, oral and documentary, was introduced by the respective parties. At the close of all the evidence the court, on defendant's motion, instructed the jury to return a verdict for defendant, which they did, and on February 8, 1921, a judgment in favor of defendant was entered. To reverse this judgment plaintiff sued out a writ of error from this appellate court, and such proceedings were thereafter had that on April 18, 1923, this court reversed the judgment and remanded the cause (225 Ill. App. 644.)

After the cause, in pursuance of the mandate, had been re-docketed in the Superior Court, the parties, on December 22, 1923, entered into a written stipulation wherein it was agreed that the cause be submitted to the court for trial without a jury, that all evidence produced at the first trial (as contained in the bill of exceptions presented to this appellate court in said writ of error case) be introduced upon the second trial, and that the Superior Court determine the issues upon that evidence alone. Thereafter the cause was submitted to the court without a jury

upon the evidence introduced at the first trial (during which it had been stipulated on December 14, 1920, that, if anything was due plaintiff from defendant, there was then due it the sum of $6,157.15). Defendant's motion for a finding in its favor was denied. The court took the case under advisement, and thereafter found the issues in plaintiff's favor and assessed its damages at $7,230. This sum was arrived at by adding 6% interest per annum to said sum of $6,157.15, from December 14, 1920, to the date of the second trial. After overruling defendant's motions for a new trial and in arrest of judgment the court, on January 17, 1923, entered judgment against defendant in said sum of $7,230, and the present appeal followed.

Plaintiff's original declaration, filed October 16, 1919, consisted of the common counts, accompanied with an affidavit of merits stating that plaintiff's demand is for money had and received by defendant for plaintiff's use, and for a balance of $1,998.83 due plaintiff "upon an account stated, for accounts of the parties for the first half of the year 1917." On November 17, 1919, plaintiff filed a bill of particulars stating that its claim is for $1,998.83, "for commissions belonging to plaintiff" under the terms of two written contracts between plaintiff and defendant, dated respectively June 15, 1915, and August 31, 1915, and further because of an account stated between the parties on July 5, 1919, as disclosed by an affidavit of that date of Conrad Engeberg, treasurer of defendant.

To this declaration defendant filed a plea of the general issue and several special pleas, together with an affidavit of merits. In the 3rd special plea defendant averred in substance that plaintiff was an Arizona corporation; that in its charter it was provided that the purposes for which it was incorporated, among others, were to act as insurance agent, financial agent, broker or fiscal agent for other corporations, to own and control shares of

its own capital stock and that of other corporations, to vote any shares of stock of other corporations owned by it, to do a general mercantile business, etc., and that its principal place of business outside of the Territory of Arizona should be at Chicago, Illinois; that in December, 1910, it commenced the transaction at Chicago, Illinois, of the business for which it was incorporated; that thereafter it always maintained an office, transacted all of its business, and held all of its corporate meetings in Illinois; that it had never been licensed to transact business in Illinois and that it never had complied with the provisions of the Illinois statutes regulating the admission of foreign corporations for profit to do business in Illinois; that said contracts of June 15, 1915 and August 31, 1915, were both executed in Illinois at a time when plaintiff was transacting its business in Illinois in violation of said statutes, and were both to be performed therein, and their execution was a part of plaintiff's business then being transacted in Illinois; and that by reason of the foregoing the said contracts are null and void and plaintiff is prohibited from maintaining any action thereon in the courts of Illinois.

On March 18, 1920, plaintiff filed an additional and special count, in which it set forth in hæc verba the contract of August 31, 1915, together with exhibits A and B attached thereto, and alleged performance of the contract on its part and defendant's failure to pay certain moneys required to be paid thereunder. To this count defendant filed substantially the same pleas as filed to the common counts, and also a 5th special plea, in which it averred in substance that said contract sued upon referred to another contract between plaintiff and the Midland Casualty Co. of Illinois, dated September 27, 1913, and which by its terms was to be performed in Illinois; that at said date plaintiff was

doing business in Illinois without a license and said contract of September 23, 1913, was on this account null and void; that the only consideration for the making of the contract sued upon was the cancellation of said contract of September 23, 1913; and that because said 1913 contract was null and void there was no consideration for the contract sued upon. Replications were filed by plaintiff to all of defendant's special pleas.

The evidence discloses in substance the following facts: Defendant is a Wisconsin corporation. Its name was originally "Badger Casualty Company" but subsequent to the signing of the contract of August 31, 1915, it changed its name to that of "Midland Casualty Company." There was a separate Illinois corporation, also named "Midland Casualty Company," (hereinafter referred to as "Illinois Casualty Co.") which did an insurance business, and had its principal office at Chicago. Plaintiff corporation, Midland Operating Company, was organized under the laws of Arizona on December 23, 1908, with an authorized capital stock of one million dollars. Its charter discloses that the purposes for which it was organized were those as stated in defendant's 3rd special plea above mentioned, and that its principal place of business outside of Arizona was at Chicago, Illinois. It was admitted on the trial that plaintiff never obtained a license to transact business in Illinois. On February 10, 1909, the first meeting of its board of directors was held at Chicago, at which meeting by-laws were adopted and officers elected. The treasurer was instructed to deposit all corporate funds in a Chicago bank, and the president and secretary were authorized to make contracts with managers and agents. On December 29, 1910, plaintiff entered into a written contract at Chicago with said Illinois Casualty Co., by which plaintiff secured the exclusive right to sell its capital stock and receive as compensation 10% of the selling price, monthly settlements to be made, and plaintiff agreed to put the stock

on the market, advertise it and employ such agents as it deemed necessary, without expense to the Illinois Casualty Co. On the same day plaintiff entered into a second contract at Chicago with the Illinois Casualty Co., under which contract plaintiff was appointed the exclusive general agent for the United States of the Illinois Casualty Co., to secure applications for the various kinds of insurance written by the Illinois Casualty Co. and to collect the premiums thereon, the contract further providing that the Illinois Casualty Co. should not write any insurance, or issue any policies, except through plaintiff. And plaintiff therein agreed to use its best efforts to establish agencies and to secure business in all the territory in which the Illinois Casualty Co. was authorized to transact business, and further agreed to pay the Illinois Casualty Co. all moneys received or collected by it or its agents, less commissions, etc. The contract further provided for commissions being paid to plaintiff, ranging from 35-1/2 to 37-1/2% on various kinds of insurance, and plaintiff agreed to employ all agents and pay their commissions and protect the Illinois Casualty Co. against agent's claims, to furnish all other necessary advertising and printed matter not specially mentioned in the contract, and to stand all other expenses necessary to secure business, for which additional expenses plaintiff was to receive an additional 7½% on gross premiums, and plaintiff further agreed to render accountings under this contract at least once in each three months. On November 28, 1911, plaintiff entered into a supplementary contract at Chicago with the Illinois Casualty Co., by which certain modifications as to commissions were made.

On September 23, 1913, plaintiff entered into another contract at Chicago with the Illinois Casualty Co., which recited the making of the two contracts of December 29, 1910, and the making of the modifying contract of November 28, 1911, and further recited that plaintiff, up to September 23, 1913, had "fully carried out

and performed its undertakings as by said agreements required," and had expended a large amount of money in establishing agencies for the sale of insurance, written by the Illinois Casualty Co., and also by the sale of 5,000 shares of the increased capital stock of the Illinois Casualty Co., and that both parties desired to enter into a new arrangement which should be substituted for the two contracts of December 30, 1910, and the supplementary contract of November 28, 1911. The contract provided that "from and after January 1, 1914, for a period of 22 years, up to and including December 31, 1935," the Illinois Casualty Co. would pay plaintiff, in lieu of payments provided in the contracts of December 29, 1910, a certain fixed percentage upon the gross premiums collected by the Illinois Casualty Co. from the sale of all accident and health policies issued by it during said period, payments to be made semi-annually, accompanied by written statements, which statements plaintiff should have the right to verify by an inspection or examination of the books and records of the Illinois Casualty Co.; that on January 1, 1914, the Illinois Casualty Co. should assume all leases of plaintiff on the premises "now occupied by the two companies in the Insurance Exchange Building," and pay all rents thereafter accruing; and that from and after January 1, 1914, plaintiff should not be required to expend any money in connection with the carrying on of the business of the Illinois Casualty Co. and should not itself engage in the business of selling accident and health policies.

In August, 1915, defendant, under its then existing name of "Badger Casualty Co.," entered into a written contract with the Illinois Casualty Co., wherein the Illinois Casualty Co. transferred to defendant all of its right, title and interest in and to all of its industrial and commercial policy contracts, limited insurance policy contracts, railroad franchise policy contracts and re-insurance policy contracts, issued by it and in

existence on June 30, 1915, and the premiums thereon after the date of transfer, together with the good will of its business; and wherein the Illinois Casualty Co. agreed to turn over to defendant all records, books of account, etc. relating to its business; and wherein defendant, in consideration of said transfer and agreement, agreed to re-insure and assume liability on the policy contracts so sold to defendant, with certain exceptions.

On August 31, 1915, defendant, under its then existing name of "Badger Casualty Co.," of Green Bay, Wisconsin, as first party, entered into the written contract sued upon, at Chicago, with plaintiff corporation, as second party, "of Chicago, Illinois," though an Arizona corporation. The contract refers to, and attached as 'Exhibit A' the said contract of September 23, 1913, between plaintiff and the Illinois Casualty Co., and also refers to, and attaches as 'Exhibit B,' the said written contract of August, 1915, between defendant and the Illinois Casualty Co., and states that it is the desire of all three companies to cancel said contract of September 23, 1913, and enter into a new contract, which shall be substituted and take the place of all former contracts entered into between plaintiff and the Illinois Casualty Co. for the mutual benefit and advantage of defendant and plaintiff. According to its provisions defendant agreed to pay to plaintiff 8% of all premiums on policies in force with the Illinois Casualty Co., and re-insured by or transferred to defendant after July 1, 1915, (in accordance with the contract of August, 1915, attached and marked 'Exhibit B') so long as such policies, renewals or new policies, issued to the same individuals, should remain in force with defendant, - the payments to be made semi-annually on January 15th and July 15th of each year; and plaintiff agreed "to co-operate in every way reasonably within its power" to facilitate the transfer of the insurance business of the Illinois Casualty Co., (as provided in that company's contract with defendant of August, 1915,

'Exhibit B' attached), and also to assist defendant in the retention and continuation of the business of the Illinois Casualty Co. and the collection of the premiums due upon the same, and also to give defendant "such assistance as it reasonably can in retaining such of the agency organization" of plaintiff as defendant might desire; and defendant further agreed to use its best endeavors to retain and maintain all of the insurance contracts and policies transferred to it by the Illinois Casualty Co. (under the provisions of said contract, 'Exhibit B'), in so far as the same should be considered desirable business, and that it (defendant) would not cancel any such insurance without good cause, and would use due diligence to collect premiums in process of collection and in arrears, on the date of the transfer to it of such insurance, and would promptly turn over such collections to the Illinois Casualty Co., in accordance with the provisions of its contract with the Illinois Casualty Co. (Exhibit B.)

The evidence further discloses that on October 10, 1910 (nearly two years after the plaintiff corporation had been organized under Arizona laws) a corporation of the same name (Midland Operating Company) was organized in Illinois (hereinafter referred to as "Illinois Operating Co.") Its capital stock was $2,500. Its objects were to act as insurance agent and broker for other corporations, and to do a general mercantile business. Shortly after its organization plaintiff became the owner of its entire capital stock, and thereafter its executive officers and its directors were respectively the same persons as the executive officers and the directors of plaintiff. The Illinois Operating Co. appears to have ceased doing any business in 1914, shortly after plaintiff and the Illinois Casualty Co. entered into the contract of September 25, 1913. It never declared a dividend, and never had a bank account of its own, but whatever moneys it possessed were all deposited in one or the

other of plaintiff's bank accounts in Chicago. Any division of these moneys, if any, between it and plaintiff was merely a matter of bookkeeping. The two "Operating" companies used the same offices, the same letter heads, the same forms in selling stock or insurance, and the office employees of each company performed services for the other.

The evidence further discloses that plaintiff's business of selling the capital stock of, and of securing applications for insurance written by, the Illinois Casualty Co., (under and by virtue of the said two contracts of December 20, 1913) was conducted by plaintiff until about January 1, 1914; that up to that date it had sold at least 5,000 shares of said stock, and had obtained a large number of applications for insurance policies, the gross premiums of which amounted to over $200,000; that plaintiff's main business office was at all times in Chicago, Illinois; that it had an office with one desk in Phoenix, Arizona, and various agency offices in States other than Illinois; that apparently all of said stock and insurance sold for the Illinois Casualty Co. within Illinois was sold by the Illinois Operating Co., but that all the commissions received from these sales ultimately went into plaintiff's treasury; that plaintiff's agents, who sold said stock and insurance in states other than Illinois were either employed in Chicago or their appointments as agents were mailed to them from the Chicago office; that these agents received their expense moneys from plaintiff's Chicago office and reported to plaintiff at Chicago, sending there the applications and premiums for insurance and also moneys received from stock sales; and that all moneys which plaintiff received or disbursed were received or disbursed at its Chicago office, and all of its securities were kept there.

The evidence further discloses that in October, 1913, and in August, 1914, plaintiff filed verified reports as to its assets, liabilities, etc., with the Arizona Corporation Commission

at Phoenix, in compliance with Arizona laws; that in the first report the assets were given as $578,729, of which amount $75,400 was stated to be the value of its real estate in Illinois, and $300,000 to be the value of its "contract" with the Illinois Casualty Co., and its "agency plant;" that in the second report its real estate in Illinois was valued at $16,400; that from January, 1910 to December, 1920, plaintiff had bank accounts in two Chicago banks, one of which was always an active account; that plaintiff's "home" offices in Chicago were also occupied in common by the Illinois Casualty Co., the Illinois Operating Co., and the "Midland Investment Company" (another corporation with which plaintiff had dealings); that while the leases for these offices were not taken in plaintiff's name it contributed its share of the rent; that it employed a number of bookkeepers and stenographers, who worked in said offices; that all of the records of its business were kept in Chicago, that all of its directors' meetings were held in Chicago, that of its several declared dividends all were paid from Chicago, and that, in short, the conduct of its entire business was directed from Chicago.

On January 1, 1914, plaintiff ceased to sell stock or insurance, and thereafter, until it entered into the contract sued upon of August 31, 1915, with defendant, its business consisted of collecting money from the Illinois Casualty Co., under the contract of September 23, 1913, looking after its investments and collecting rents, all of which business was transacted in or directed from Chicago. After the making of said contract of August 31, 1915, it continued looking after its assets and collecting rents, and it received certain moneys from defendant, all of which business was done or directed from Chicago.

After the contract sued upon of August 31, 1915, was made, defendant made two or three payments to plaintiff, which

were turned over to the Midland Investment Co. The payments and the turn-overs took place in Chicago. While there is no direct evidence that said contract of August 31, 1918, was assigned by plaintiff to said Investment Co., there is evidence tending to show that there was some kind of an assignment from plaintiff to said Investment Co., and that said contract was deposited by plaintiff in Chicago with the Investment Co., as collateral security for its note given to the Investment Co. None of plaintiff's books or records, or those of the Illinois Operating Co., were produced upon the trial, although defendant endeavored to obtain them at the trial by notice to produce and subpoenas. Their absence was accounted for by the statement of an executive officer of both companies that some time in the year 1916 or 1917 the then secretary of both companies left Chicago, and disappeared with the books and records, and they were never thereafter recovered.

The only evidence offered by plaintiff to sustain its claim for commissions under said contract of August 31, 1918, sued upon, was said contract, evidence of several payments made by defendant to plaintiff, and an affidavit furnished by defendant's treasurer, showing amounts collected by defendant on insurance policies which had been transferred to defendant by the Illinois Casualty Co. for the period from January 1, 1917, to July 1, 1919. It was expressly stated in the affidavit that the same was made with the understanding "that it shall not be taken to be an admission of the existence of a contract and shall never be used for that purpose." Plaintiff offered no evidence whatever tending to prove that it had co-operated with defendant in any way to facilitate the transfer to defendant of the insurance business of the Illinois Casualty Co., or had assisted defendant in the retention of such business, or had assisted

defendant in retaining plaintiff's agency organization (as under the terms of said contract of August 31, 1914, plaintiff had agreed it would do).

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Among the points urged by defendant's counsel for a reversal of the judgment appealed from are (1) that the finding and judgment are contrary to the evidence on the issues of fact raised by defendant's 3rd special plea to the common counts and to the special count, (2) on the issue of want of consideration of the contract of August 31, 1910, sued upon, as raised by defendant's 5th special plea to the special count, and (3) that the trial court erred in refusing to grant defendant's motion at the close of all the evidence for a directed verdict in its favor because plaintiff failed to introduce any evidence showing that it had performed, as alleged, its undertakings mentioned in said contract.

Answering these contentions, plaintiff's counsel first contend that the decision of this appellate court on the former hearing (225 Ill. App. 644) is res adjudicata as to this appeal and as to said contentions. We cannot agree. All that this court decided on the former appeal was that the trial court on the first trial should have submitted the cause to the jury on the issue of fact raised by defendant's 3rd special plea, and that, because the court directed a verdict in defendant's favor and erroneously entered judgment thereon, the cause should be remanded for a new trial. There was no final adjudication of these issues or of the cause. In the opinion then filed we gave our reasons for our decision, citing the case of Libby, McNeill & Libby, 222 Ill. 306, that the law was that "the evidence of an affirmative defense was not sufficient to warrant the trial court in failing to observe the rule that, if there is any evidence in the record which, standing alone, tends to prove the material allegations of the declaration, the motion for an instructed

verdict should be denied, even though the trial court is of the opinion that a verdict for plaintiff, if given, must be set aside as against the preponderance of the evidence." In Linington v. Strong, 111 Ill. 162, an action in assumpsit, the first trial resulted in a judgment in favor of the defendant. This judgment was reversed by the appellate court and the cause remanded. On the second trial there was a verdict and judgment in favor of the plaintiffs and this last judgment was affirmed by the appellate court. On appeal by the defendant to the Supreme Court it was contended that the appellate court, by its judgment when the cause was first before it, decided that there were two material variations between the contract sued on and the original draft thereof and that the question of the materiality of said variations became res adjudicata, and was no longer open to discussion either in the trial court or the Supreme Court. In passing upon the contention our Supreme Court said (p. 169): "The judgment of the Appellate Court can have no such effect in this case for the reason that it was not final. The defendant below (appellant here) could not have maintained an appeal or writ of error to review that judgment of the Appellate Court, and the appellees here could not have their own judgment reversed, and it not being final as to one party could not be so held as to the other. If one party is concluded by the judgment, the other must be equally concluded." (See also Board of Trade v. Nelson, 162 Ill. 431, 437; Friedman v. Lesher, 190 Ill. 21, 25; Ferry v. City of Waukegan, 205 Ill. App. 109, 113.) In the Ferry case, plaintiff, as administratrix, sought to recover damages for the death of her intestate as a result of an automobile accident alleged to be due to the city's negligence. On the first trial the court instructed the jury to return a verdict finding the city not guilty, which they did, and judgment was entered in the city's favor. On appeal by plaintiff to the appellate court the judgment was reversed and the cause remanded [196 Ill. App.

81.) Upon a second trial plaintiff had a verdict and a judgment for $3,000. The only grounds on which a new trial was sought were that the verdict was not supported by the law or the evidence. On the second appeal to the appellate court the plaintiff contended that the appellate court's former decision was decisive of the case presented on the second appeal, but the appellate court (2nd district) held to the contrary, saying (p. 112):

> "At the former trial the verdict was based upon an instruction directing the jury to find the defendant not guilty. Our former decision was that there was evidence fairly tending to make a case for the plaintiff and that in such case the court was not warranted in directing a verdict for the defendant. Such an instruction under such circumstances must be refused, even if the evidence is such that, if a verdict was returned for the plaintiff, the court would feel bound to grant a new trial. Libby, McNeill & Libby v. Cook, 322 Ill. 206. Therefore, our former decision did not determine that a weighing of the evidence on a motion for a new trial or on an appeal would support the verdict. Therefore, the merits must here be considered."

With particular reference to points 2 and 3 urged by defendant's counsel, plaintiff's counsel, while admitting that said points were not raised or considered in this appellate court in the former writ of error case, argue in substance that litigants cannot bring cases to a court of review "in piecemeal" (Muren Coal & Ice Co. v. Howell, 317 Ill. 190, 196) and that "when a cause is litigated and that litigation prosecuted to a court of appeals and passed upon, all questions that were open to consideration and could have been presented, relating to the same subject matter, are res adjudicata, whether they were presented or not." (Lusk v. City of Chicago, 311 Ill. 183, 188.) We deem the argument to be without merit, for the reason that the appellant in the present appeal is not the same party who prosecuted the former writ of error and the rule announced in the cases cited is not on that account applicable. (Bailey v. Robison, 344 Ill. 16, 21.) The former writ of error case was

prosecuted by plaintiff. There was no adjudication on the issues presented but the cause was remanded generally for a new trial. The present appeal is prosecuted by defendant.

Plaintiff's counsel also direct our attention to certain statements made by this appellate court in its former opinion, which they say must be considered as the "law of the case" and, as such, binding upon this court on the present appeal. In other words, the contention is that because of said statements, rather than the actual decision, this appellate court is precluded on the present appeal, where the same and no additional evidence is contained in the record, from considering upon their merits the points relied upon by defendant's counsel for a reversal of the present judgment. In the case of City of Hastings v. Foxworthy, 45 Neb. 676, mentioned in the opinion of our Supreme Court in the case of Belakis v. Boring Coal Co., 246 Ill. 62, 66, there is a full discussion of the doctrine of the "law of the case," and in the course of its opinion the Nebraska court said (p. 697): "It needs but a moment's reflection to show that there is no adjudication by the expression of an opinion on a point of law where no judgment is entered in accordance with that opinion but the cause is remanded generally. The only thing adjudicated is that there was error in the record, and that the whole case should be re-litigated." Under the somewhat peculiar situation we are of the opinion that this doctrine of the "law of the case" should not here be so applied as to preclude this appellate court from now considering and deciding upon their merits the several points urged by defendant's counsel for a reversal of the present judgment.

As to the first point urged by defendant's counsel, it was admitted on the trial that at no time had plaintiff, an Arizona corporation, obtained a license to do business in the State of Illinois. And the evidence clearly shows that on September 23, 1913, when at Chicago plaintiff made its contract

of that date with the Illinois Casualty Co., and for several years prior thereto, plaintiff, a foreign corporation, had been "doing business" in Illinois without a license. It had made at Chicago the two contracts of December 29, 1910, and the modifying contract of November 28, 1911, with the Illinois Casualty Co., and had performed acts thereunder in Chicago; it had acquired at Chicago the entire capital stock of the Illinois Operating Co., a thing which it was specifically authorized by its charter to do, and continued to hold said stock; it had acquired in Illinois the stock of the National Telephone & Electric Co. of Clinton, Illinois; it had made at Chicago the accountings and payments, provided for under the two contracts of December 29, 1910, with the Illinois Casualty Co.; it had acquired several parcels of Illinois real estate and at or from Chicago managed the properties and collected the rents; it had made contracts at Chicago with the Midland Investment Co.; it had kept in its Chicago office forms of insurance policies of the Illinois Casualty Co., which, when insurance was written for that company by plaintiff's agents, plaintiff countersigned and sent to said agents for delivery; it had continuously, at or from Chicago, either through itself or the Illinois Operating Co., hired agents to sell the stock of, and the insurance written by, the Illinois Casualty Co.; it had maintained several bank accounts in Chicago banks; it had received at Chicago large sums of moneys from said agents; it had kept at Chicago the books and records of its business dealings and constantly had employed at Chicago a sufficient number of clerks to keep said books and records; and, generally, at or from Chicago, it had conducted all of the business which it was authorized by its charter to do. And the evidence further shows that all of its business done in Illinois was not done by the "dummy" corporation - the Illinois Operating Co. The attempt to make it appear that that company was

the one which was doing the business in Illinois is a mere subterfuge. The contracts under which plaintiff did its business were executed by it and not by the Illinois Operating Co., and plaintiff really did the acts required to be done by it thereunder, and did them in or from Chicago. The making in Chicago of the contract of September 25, 1913, (which was a substitute for the unexpired contracts of December 29, 1910) was not, therefore, an "isolated" business transaction, or a transaction which can be construed as one relating to plaintiff's "internal affairs," which term, as stated in Edwards v. Schillinger, 245 Ill. 331, 345, "must be confined to relations affecting only the stockholders and the corporation among themselves." And, under the facts disclosed, the making of the contract by plaintiff was a clear violation of Illinois laws, rendering it a void contract. (Cincinnati Mutual Insurance Co. v. Rosenthal, 55 Ill. 85, 91; United Lead Co. v. Ready Elevator Mfg. Co., 282 Ill. 199, 202; Ryerson v. Shaw, 277 Ill. 524, 530.) And, it being null and void, no action could have been maintained thereon at any time even if plaintiff should at some time after the making of the contract have qualified itself to transact business in this State. (United Lead Co. v. Ready Elevator Mfg. Co., supra.) And it follows, we think, that, after the making of this contract, the mere ceasing by plaintiff to do business in Illinois would not validate or vitalize the void contract. But plaintiff did not then cease doing business in Illinois; it did not go into liquidation but continued an active concern. The contract was made for a period of 22 years, beginning January 1, 1914. Instead of actively selling stock and securing insurance applications for the Illinois Casualty Co., plaintiff thereafter, and until the making of the contract with defendant of August 31, 1918, owned upon, collected in Illinois from the Illinois Casualty Co. its commissions semi-annually on gross premiums. By the contract of September 28, 1918,

it reserved the right to make semi-annual inspections of the books and records of the Illinois Casualty Co. Those books were in that company's main office in Chicago, and, hence, such examinations would and did take place in Illinois. The case of Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 611, is in point. The question was whether at the time service of process was had in 1896 in Tennessee on the insurance company's agent, who was temporarily in Tennessee on the company's business, it was then "doing business" in Tennessee so as to make the service legal on it. It appears that for many years prior to July, 1894, the company did an active insurance business in Tennessee and there issued policies of insurance upon the lives of citizens of Tennessee; that about July, 1894, it ceased issuing new policies in Tennessee, withdrew its agents from the state and notified the insurance commissioner to that effect; that it had, however, many policies in Tennessee still in force and continued to receive premiums thereon, not in Tennessee but through a former Tennessee agent, who, at the time of receiving the premiums, resided at Louisville, Kentucky; and that, in addition to receiving premiums on old policies in this manner, the company continued to settle claims on such policies as they arose. It was held that the collection of the premiums on the old policies by the former agent, even without the state, was such a continuation of the company's former business in the state as amounted to "doing business" therein, and, hence, rendered the service of process valid. So, in the present case, we think that the making of the new contract in Illinois, growing out of the business previously done by plaintiff in Illinois, and the collection semi-annually of commissions thereunder in Illinois, after inspectio of records in Illinois, amount to a continuation of "doing business" in Illinois by plaintiff. And the evidence discloses that between September 23, 1913, and August 31, 1916, it did other business in Illinois. It managed its real estate situated in Illinois

and collected rents therefrom in Illinois, and it maintained two separate bank accounts in Chicago banks, one of which was always an active account. It had its business office in Chicago and did not have any other business office outside of Illinois. It kept its books and records and held its directors' meetings in Illinois. In our opinion the evidence clearly shows that, when the contract of August 31, 1918, sued upon, was executed, plaintiff was doing business in Illinois, and, not being licensed under Illinois laws, that contract is void, and, being void, plaintiff, under the authorities above cited, cannot maintain the present action thereon. The contract cannot be considered as a single or isolated transaction, and, even if it could, there is shown by its terms and by plaintiff's past actions a purpose on its part to continue to do further business in Illinois, similar to that done after the contract of September 23, 1913, was made. And it is the law that, such purpose being shown, even the doing of a single or isolated transaction, is sufficient to constitute "doing business" in violation of the statute. (Critchfield & Company v. Armour, Ill. App. Ct. 1st Dist., No. 27869, opinion filed February 13, 1923, not yet reported; International Text Book Co. v. Lynch, 81 Vt. 101, 105; Lowenmeyer v. National Lumber Co., 71 Ind. App. 458, 464; John Deere Plow Co. v. Wyland, 69 Kan. 255, 258; Keyens v. Worthington, 150 Mich. 580, 588.) Furthermore, to hold the contract sued upon to be a valid one and to sustain the present judgment would in effect put a premium upon plaintiff's illegal acts, done in Illinois prior to the making of the contract. It would give sanction to a foreign corporation, after doing illegal acts, escaping the consequences of those acts by merely transferring its business to another party and receiving in consideration of the transfer a share in all future profits resulting in part from its previous illegal acts. The public policy of the State, as disclosed in the statutes relating to foreign corporations, forbids, we think, any

such result. Our conclusion is that the finding and judgment of the trial court are against the evidence on the issues of fact raised by defendant's 3rd special plea, that plaintiff's action cannot be maintained, and that it is our duty to reverse the judgment without remanding the cause. (Siegel v. Chicago City Ry. Co., 216 Ill. App. 11, 17, and cases there cited.)

These holdings render it unnecessary for us to discuss at length points 2 and 3, first above mentioned, of defendant's counsel. However, we deem it proper to say that in our opinion both points have merit. The consideration for the making of the contract of August 31, 1915, sued upon, was the cancellation of the void contract of September 23, 1913, and there was no evidence introduced by plaintiff showing that it had performed the undertakings which by the contract sued upon it had agreed to perform, and which it alleged in its special count it had performed. Evidently plaintiff on the trial was confronted with something of a dilemma, for if it proved performance of those undertakings it would itself give additional evidence of doing business in Illinois without a license.

The judgment of the Superior Court is reversed.

REVERSED WITH FINDING OF FACTS.

Fitch and Barnes, JJ., concur.

FINDING OF FACTS.

We find as ultimate facts in this cause that plaintiff is an Arizona corporation for profit, that it has never been licensed as a foreign corporation for profit to do business in the State of Illinois; that when the contract sued upon was executed on August 31, 1915, at Chicago, Illinois, by the parties to this cause, plaintiff was, and had been for several years prior thereto, doing business in Illinois without a license and in violation of the laws of Illinois; and that plaintiff is not entitled to recover any sum of money from defendant upon said contract.

(3394a)

165 - 28441

J. C. HARLOW,
Appellee,

vs.

M. NIEDERMAN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 309

MR. PRESIDING JUSTICE GRINNELL DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment for $322.75 rendered against him on December 27, 1922, by the Municipal Court of Chicago, after a trial before the court without a jury.

Plaintiff's claim is for money due on defendant's promissory note for $300, dated November 22, 1921, payable to the order of plaintiff two months after date, with interest at 7% per annum. The amount of the finding and judgment includes the face of the note and accrued interest.

On February 26, 1921, plaintiff delivered a written proposal to defendant wherein he agreed to make certain alterations and repairs to the latter's home at No. 6145 Winthrop avenue, Chicago, for the sum of $6,000. Included in the proposed work was that of installing a "steam or hot water self feeder boiler with sufficient radiation for entire building." Defendant entered upon the work and completed it, including certain extra work, before June 30, 1921. For the extra work plaintiff made a total charge of $1,198.25, to which defendant never made any complaint. From time to time during the progress of the work defendant made various payments on account, and on June 22, 1921, plaintiff had received $6,000, leaving a balance claimed to be due him of $1,198.25. Subsequently defendant was

(3374-a)

requested several times to pay the balance but he did not do so. During October, 1921, and again early in November, defendant complained that the heating plant did not give sufficient heat, and plaintiff, together with his sub-contractor who had installed the heating plant, went to the house, explained to defendant that he had not fired the boiler properly, and warmed the house in a short time, and plaintiff heard no further complaints until after he had insisted upon the immediate payment of said balance. On November 22, 1921, the parties met at plaintiff's office. Defendant again complained of the insufficiency of the heating plant, but, after some discussion, a settlement of differences was effected. Defendant gave plaintiff his check for $600 (afterwards paid), executed and delivered the note in question, and plaintiff reduced the amount of his claim by $298.35, and gave defendant a receipt in full of all demands.

When the note matured defendant refused to pay it, and on February 23, 1922, plaintiff commenced the present action. In his affidavit of merits defendant alleged in substance that the note executed by him was accepted by plaintiff with the understanding that, in the event the heating plant was not sufficient or satisfactory to defendant, the amount evidenced by the note would be applied upon the necessary costs of remedying the defects; that during the winter months of 1921 - 1922, defendant ascertained that the plant was not sufficient to properly heat the entire building, notified plaintiff to that effect and requested him to make the necessary changes, which he refused to do; and that because of these facts defendant is not liable on the note and does not owe plaintiff any sum. Defendant also filed an amended claim of set-off in which he alleged that plaintiff failed to install a sufficient boiler or sufficient radiation to properly heat the house and that by reason thereof defendant was required to and did pay for additional

materials and labor, to his damage in the sum of $900. Plaintiff's affidavit of merits to this claim of set-off was to the effect that defendant, prior to November 22, 1921, had made unfounded complaints as to the capacity of said heating plant, but that on said date a settlement of differences was made by defendant giving said check and note and accepting the plant. After hearing evidence introduced by both parties the court found the issues in favor of plaintiff on his statement of claim and against defendant on his claim of set-off.

After a careful review of the present record, we are satisfied that the finding and judgment are amply supported by the evidence. It clearly appears that, by the acts and doings of the parties on November 22, 1921, there was an accord and satisfaction. "An accord is an agreement whereby one of the parties undertakes to give or perform, and the other to accept in satisfaction of a claim, liquidated or in dispute, and arising either from contract or from tort, something other than or different from what he is or considers himself entitled to; and a satisfaction is the execution of such agreement." (1 Corpus Juris, p. 520, sec. 1.) "Where an accord has been executed it operates as a complete bar to an action on the original claim, * * and the matters involved in the settlement are not subject to be reopened by either party." (1 Corpus Juris, p. 523, sec. 2; Murrle Glass Co. v. H. M. Hooker Co., 120 Ill. App. 433, 434; McCartney v. Washburn, 82 Ill. App. 540, 541; Hill v. Parsons, 110 Ill. 107, 113.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

(3395a)

252 - 28528

JOSEPH GREENSPON'S SONS IRON AND STEEL COMPANY, a corporation,
Appellee,

vs.

A. LEVINE & COMPANY, a corporation,
Appellant.

Appeal from
Superior Court,
Cook County.

231 I.A. 309

MR. PRESIDING JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $4,048, rendered against defendant on October 25, 1921, by the Superior Court of Cook County, in an action of assumpsit, tried before the court without a jury.

The action, commenced on November 12, 1920, is for damages for defendant's alleged breach of a written contract between the parties in failing to deliver the balance of certain rails. The cause was tried on stipulated facts, supplemented by other evidence. On June 29, 1921, the court entered a finding for plaintiff, assessing its damages at $3,979.75. Defendant's motion for a new trial was not overruled until after the lapse of several months. In fixing the amount of the judgment the court added legal interest to the amount of the finding.

In the contract, executed on March 29, 1920, it is stated that defendant has sold, and plaintiff has purchased "six miles of 60 lb. Rails with Angle Bars and fourteen miles of 70 lb. Rails with Angle Bars;" that the 60 lb. rails are now lying in the right of way of the Chicago and Alton Railroad, between Cedar City and Mexico, Missouri, and the 70 lb. rails in the right of way of said railroad between Dwight and Streator, Illinois; and that defendant is to deliver to plaintiff the

straight run of rails as inspected by plaintiff, and none of the rails is to be reserved. The contract contained the following additional paragraphs:

> "PRICE - $37.25 per gross ton with angle bars weighed in f.o.b. cars anywhere on the Chicago & Alton Railroad Lines.
>
> DELIVERY - To commence immediately after shipping instructions furnished by Jos. Greenspon's Sons. Cars to be taken by Jos. Greenspon's Sons when loaded by the Chicago & Alton Railroad Company. Shipping instructions to be furnished within twenty days from this day.
>
> TERMS - Draft against bill of lading - Chicago & Alton Railroad's certified railroad weights to govern settlement. Should there be a portion of the above mileage of rails undelivered by the expiration of one hundred and twenty days only through the failure of the Chicago & Alton Railroad to make delivery it shall remain optional with Jos. Greenspon's Sons Company to take same or cancel same."

It was stipulated that defendant had delivered to plaintiff all of the rails specified in the contract, except 233 tons, within the 120 days mentioned; that the 233 tons were not delivered to plaintiff within said period solely because the Chicago & Alton Railroad Company had failed to make delivery of them to defendant; that of the 233 tons of undelivered rails there remained 155 tons of the sixty pound rails and 78 tons of the seventy pound rails; that none of the undelivered rails was loaded on cars by the railroad company prior to March 11, 1921 (after the commencement of the action); that on March 11, 1921, defendant advised plaintiff by letter that the railroad company was "ready to load and ship about 200 tons of the seventy pound rails from the Dwight branch," and asked plaintiff for shipping instructions; and that after plaintiff had received the letter its attorney telephoned defendant's attorney that plaintiff would not accept any rails or furnish shipping instructions.

It further appears that on July 6, 1920 (before the expiration of the 120 days) defendant, replying to a letter of plaintiff of July 2nd, wrote plaintiff stating that it (defendant) had shipped according to instructions all of the rails that the

railroad company had delivered to it. After directing plaintiff's attention to the paragraph of the contract headed "Terms," it further stated: "As we have not received any more rails from the Chicago & Alton R. R., and it being only their failure to deliver to us, we cannot see any justice in your claim. If the Chicago & Alton R. R. will deliver the balance to us within the time of our contract, we will be pleased to turn these over to you or to your order." Plaintiff, in reply to this letter, wrote defendant on July 9th, mentioning said paragraph of the contract, and saying:

> "You evidently have misinterpreted the meaning of this paragraph. If you will digest the same more thoroughly you will find that you are to deliver to us full six miles of 60 lb. rail and full fourteen miles of 70 lb. rail. As to the failure of the Chicago & Alton railroad to deliver the rails to you, - this only means as to the time, namely, that should there be a portion of the mileage of rails undelivered at the expiration of 180 days, it will remain optional with us to take or cancel same. We now elect to exercise our option by advising you that if the balance of these rails are not shipped by July 29th, we shall wait a reasonable time thereafter - for instance, 30 days. It will, therefore, behoove you to arrange to make delivery by July 29th, or, within a reasonable length of time after July 29th."

Plaintiff's declaration consists of two counts. In the first, after setting forth the contract in hæc verba, plaintiff alleged in substance that defendant had promised that it would ship and deliver to plaintiff the rails as therein mentioned; that defendant delivered only certain mentioned portions of the rails which plaintiff accepted and paid for; that on July 9, 1930, plaintiff advised defendant that "it elected to exercise its option to take" the balances of the rails, "as provided in the said contract," wherein and whereby defendant "became obligated to deliver the said rails within a reasonable time;" and that although such reasonable time had long since elapsed and plaintiff had always been ready to accept delivery, etc., yet defendant did not, nor would, within such time or afterwards,

procure to be delivered or shipped to plaintiff the said rails, but refused so to do; by means whereof plaintiff has been damaged, etc. The second count was framed on the theory of defendant's failure to deliver the balance of the rails within a reasonable time. Defendant's general demurrer to both counts was overruled and thereafter defendant filed a plea of the general issue.

On the trial defendant's attorney contended in substance that under the provisions of the contract defendant was obligated to deliver the rails to plaintiff only "when loaded" in cars by the Chicago & Alton Railroad Company, and that, because of the stipulated fact that the non-delivery to plaintiff of the balances of the rails within the 120 days was caused solely by the failure of the railroad company to make delivery of said balances to defendant, and because of the further fact that plaintiff did not at any time elect to take said balances thereafter and "when loaded" in cars by the railroad company ready for shipment, defendant is not liable to plaintiff in any sum. Propositions of law, embodying these contentions and submitted by defendant's attorney, were refused by the court, as was also the motion for a finding in defendant's favor made at the close of all the evidence. Plaintiff's attorneys contended in substance, following the allegations of the declaration, that, because of plaintiff's letter of July 9, 1920, defendant under the contract was obligated to make deliveries of said balances of the rails within a reasonable time after July 20, 1920 (when the 120 days expired) whether said balances of the rails had then been loaded in cars by the railroad company or not. Defendant's attorney stated on the trial that, under the terms of the contract, he did not think that any question as to a "reasonable time" arose, and further stated that, "if plaintiff's attorneys were correct in their interpretation of the contract, a reasonable time for the delivery of said balances

would be about August 29, 1920. (viz: 30 days after the expiration of said 120 days.)

The main point here urged by defendant's counsel for a reversal of the judgment is that, under the terms of the contract and the undisputed facts, plaintiff is not entitled to recover any sum from defendant as damages. While in the paragraph of the contract headed "Delivery," the delivery of the rails was to commence immediately upon the furnishing of shipping instructions by the plaintiff (to be furnished within 30 days) there is no definite provision in the contract as to when the delivery of the rails is to be completed. The time of the deliveries is dependent upon acts to be performed by a third party, for it is stated in said paragraph that the cars are to be taken by plaintiff "when loaded by the Chicago & Alton Railroad Company." It was the evident intention of the contracting parties, who manifestly had no control over the railroad company as to the time and manner of loading the rails into cars ready for shipment, that defendant should be under no obligation to deliver any rails until they were loaded in cars by the railroad company. In the paragraph headed "Delivery," it is provided that, should a portion of the rails be undelivered at the expiration of 120 days "only through the failure of the Chicago & Alton Railroad to make delivery," plaintiff had an option to "take same or cancel same." Thus it appears that the contracting parties had in mind the possibility that the railroad company within the 120 days might not make delivery of all of the rails. In this event plaintiff had the right to refuse to receive thereafter the then undelivered rails, or it might elect to receive them when delivered by the railroad company. There are no provisions in the contract, after the expiration of the 120 days, as to deliveries being made at any definite time, or within a "reasonable" time. And the undisputed evidence discloses that prior to the expiration of the 120 days

defendant delivered to plaintiff all of the rails that were loaded on cars by the railroad company, and that defendant's failure to deliver the undelivered portions or balances, prior to the commencement of the present action, was caused solely because the railroad company failed to make delivery of the rails or load them in cars. Before the expiration of the 120 days, plaintiff wrote to defendant the letter of July 6, 1920, in which it stated that it made a certain election - not the one provided for in the contract, but a different one, viz., that it would wait a "reasonable time" after the expiration of the 120 days, "for instance, 30 days," and urged defendant to cause deliveries to be made within that time. It did not elect to take the balances of the undelivered rails when delivered by the railroad company. And the evidence further discloses that none of said undelivered rails was loaded by the railroad company prior to March 11, 1921, and that, when plaintiff was advised by defendant's letter of that date that the railroad was ready to load and ship some more of the 70 pound rails, plaintiff refused to give shipping directions or to accept any more rails. It is our opinion that, under the undisputed facts and under the terms of the contract sued upon, as above construed, plaintiff is not entitled to recover any damages from defendant, and that the trial court erred in entering the judgment appealed from, or any judgment, against defendant.

Much of the testimony heard by the trial court, outside of the stipulated facts, related to the question of damages. A second contention of defendant's counsel is that the trial court improperly assessed plaintiff's damages. Discussion of this contention is rendered unnecessary because of our holding that, as a matter of law under the undisputed facts, plaintiff is not entitled to recover any sum from defendant. Accordingly, the judgment of the Superior Court is reversed, without remand-

ing the cause.

REVERSED.

Fitch and Barnes, JJ., concur.

(3396)

262 - 28508

BLANCHE NATHAN and
A. S. NATHAN,
Appellees,

vs.

WILLIAM CONNORS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.
231 I.A. 609

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $530, rendered by the Municipal Court of Chicago against defendant, in an action for damages tried before the court without a jury. It was charged that plaintiffs' automobile was damaged as the result of a collision between it and defendant's automobile, about 11:30 o'clock P. M. on March 11, 1927, at the intersection of West Lake and North Franklin streets in the City of Chicago, occasioned by the negligence of defendant's chauffeur. After hearing testimony introduced by both parties the court found the defendant guilty as charged and assessed plaintiffs' damages at the sum of $530 in tort.

From the conflicting testimony of the occupants of the two automobiles as to the details of the accident, we glean the following: Plaintiffs' enclosed automobile of the Cadillac make, driven by Blanche Nathan (wife of A. S. Nathan), was moving west at a not excessive rate of speed on the north street car track of Lake street, and, when it reached the intersection of the two streets, defendant's Studebaker coupe, driven by defendant's chauffeur, James Duffy, was moving north on the east side of Franklin street, at an excessive rate of speed, but had not yet reached the intersection, being at that time about 20 or 25 feet south of the south curb line of Lake street. The front

(337/6c)

Ref. - Letter

Bradford Dyeing Ass'
Dr. F. Firth,
Shipley.

Yr.

Ellis's reference.
Shipley.

Alpine road.
Saltaire.
Yr. reference.
Bradford.

lights on both cars were burning. Although Duffy saw plaintiffs' car approaching the intersection from his right he did not stop his car but continued to move forward in a northerly direction. When Mrs. Nathan saw that a collission was imminent she endeavored to avoid it by turning her car to the right or towards the northwest, but was unable to do so immediately because of a pillar or support in the street of the elevated structure overhead. Duffy also endeavored to avoid the collision by swerving towards the west. The collision, however, occurred at a point northwest of the center of the intersection, and, while fortunately none of the occupants of the respective cars was seriously injured, both cars were greatly damaged.

It is contended by counsel for defendant that the finding is against the weight of the evidence both as to the questions of Mrs. Nathan's contributory negligence and the negligence of defendant's chauffeur. We have carefully reviewed the conflicting testimony and cannot agree with counsel. We think the court was fully justified in finding that Mrs. Nathan, under all the facts and circumstances in evidence, was not guilty of such contributory negligence as would prevent a recovery for the damage to plaintiffs' car, and also in finding that defendant's chauffeur was guilty of negligence. It sufficiently appears that the car which he was driving approached and entered the intersection at an excessive rate of speed, and that, although he saw plaintiff's car approaching the intersection from his right and which first reached the intersection, he made no attempt to stop his car or so check its speed as to allow plaintiffs' car, which had the right of way, to pass in front of him. (Sec. 33 Motor Vehicle Law of 1919, Cahill's Stat. 1921, Chap. 95a, par. 34; Lenartz v. Funk, 224 Ill. App. 180, 186; Partridge v. Bernstein, 225 Ill. App. 209, 211.)

It is also contended that much of the testimony of plaintiffs' witness, Kaiser, as to the damages to plaintiffs' automobile, was erroneously admitted because he was not sufficiently qualified to give it and because of its incompetency. We deem it unnecessary to discuss this contention further than to say that we think that the amount of the damages assessed by the court was sufficiently proved by the competent testimony of the witness, which was uncontradicted, as to the reasonable cost of the repairs which were made to plaintiffs' automobile after the accident by the Cadillac Motor Car Company, of which the witness was an employee. (Peabody v. Lynch, 184 Ill. App. 78, 79.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

(3397a)

271 - 28547 ~~28547~~

BEN ALPERT,
Appellee,

vs.

AUGUSTA MATSON,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.
231 I.A. 309

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff commenced an action in forcible detainer in the Municipal Court of Chicago to recover the possession of premises described as the 2nd and 3rd floors of the building at Nos. 518 - 520 North Wells street in the City of Chicago. On the trial evidence was introduced on behalf of plaintiff, but none by defendant. The court found defendant guilty of unlawfully withholding the possession from plaintiff, and entered judgment on the finding. Defendant appealed.

The following facts in substance appear: Morris Cohn, by written lease in the usual form, leased the premises to be occupied as a hotel or rooming house, to Louis Weinreb, from August 1, 1919 to April 30, 1921, at a monthly rental of $75. On February 11, 1920, by a writing on the face of the lease, signed by the parties thereto, the term of the lease was extended "to October 1, 1922," at the same monthly rental. On August 26, 1920, by writings on the back of the lease, signed by said parties and by Mrs. Augusta Matson (defendant), Weinreb assigned all his right and interest in the lease as lessee to defendant, Morris Cohn consented to the assignment, and defendant assumed and agreed to make all payments and perform all the covenants and conditions of the lease, to be made and performed by the lessee, from and after September 1, 1920. Defendant took possession and

(3972a)

paid rent to Morris Cohn. One of the covenants of the lease was that at the termination of the lease, by lapse of time or otherwise, he would yield up immediate possession to the lessor. During the year 1921, Morris Cohn died, and on November 18, 1921, his will was duly admitted to probate by the Probate Court of Cook County. From the certified copy of the will, introduced in evidence, it appears that he devised and bequeathed all of his property, real and personal, to his wife, Eva Cohn, her heirs and assigns forever, and that he directed that Abraham Cohen and Louis Salinger (sons in law of Eva Cohn) should have the care and management of his real estate, and that Abraham Cohen should keep the books and accounts of the real estate, during the lifetime of Eva Cohn. On the trial defendant, called by plaintiff as a witness under section 53 of the Municipal Court Act, testified that after the death of Morris Cohn she paid the stipulated rent each month up to October 1, 1921, and that she tendered rent for the month of October, 1921, but that the same was refused. It appearing that she had in her possession her copy of the extended lease which had been assigned to her as aforesaid, the court directed her to produce it, which she did, and the same on plaintiff's offer was received in evidence, over the objection of defendant's attorney on the ground that no previous notice to produce had been given. It further appears from the evidence that on June 28, 1922, Eva Cohn, as sole devisee of Morris Cohn, deceased, executed and delivered a written lease, in the usual form, of the premises to plaintiff, from October 1, 1922, to September 30, 1932, at a monthly rental of $250 per month, and that on June 27, 1922, Eva Cohn, by her agent, Louis Salinger, caused to be served on defendant a written notice to the effect that she (Eva Cohn) had elected to terminate defendant's tenancy in the premises, and further stating "you are further notified to quit and deliver up the possession of said premises at the end of the

term of your lease, October 1, 1922." It further appears that defendant retained possession of the premises after October 1, 1922, and was in possession when the present action was commenced on October 5, 1922.

It clearly appears from competent evidence that, after the death of Morris Cohn, Eva Cohn became the owner of the premises by virtue of the will of Morris Cohn and that Abraham Cohen and Louis Salinger acted as her agents in the care and management thereof; that defendant, as assignee of the extended lease, expiring by its terms on October 1, 1922, paid her rent thereunder either to said Cohen or Salinger after the death of Morris Cohn, and took receipts therefor, including the rent for the last month of the term; that prior to October 1, 1922, Eva Cohn leased the premises to the plaintiff for a period of ten years from October 1, 1922; and that at the time of the commencement of the present action defendant was unlawfully withholding possession of the premises from plaintiff. He, and not Eva Cohn, was entitled to the possession and was the proper party plaintiff. (Jinkinson v. Owens, 180 Ill. App. 122, 125; Gazzolo v. Chambers, 73 Ill. 75, 79.) Defendant's tenancy of the premises, according to the terms of the extended lease under which she, as assignee, held, expired on October 1, 1922, and she was bound to surrender possession on that day and no notice to quit or demand of possession was necessary. (Sec. 19, Landlord & Tenant Act; Secor v. Pastana, 37 Ill. 525, 527; Schreiber v. Chicago and Evanston R. Co., 115 Ill. 340, 345; London v. Brockway, 157 Ill. 90, 94.) And there is no merit in the contention of defendant's counsel that, because Eva Cohn on June 27, 1922, caused to be served on defendant a notice to quit and to deliver up possession "on October 1, 1922," this act amounted to an extension of defendant's term, or was such a recognition of a new tenancy in defendant of some sort as required a further notice

to terminate. (Seger v. Pentang, 37 Ill. 539, 549; Jones v. Ritter, 206 Ill. App. 487, 491.) Nor is there any merit in counsel's further contention that the trial court erred in directing defendant to produce her copy of the lease, under which she had originally taken possession and which copy was then actually in court, because no previous notice to produce it had been served upon her or her attorney. (22 Corpus Juris, p. 966, Sec. 1262; Field v. Zemansky, 9 Ill. App. 479, 481.)

The judgment of the Municipal Court should be affirmed and it is so ordered.

AFFIRMED.

Fitch and Barnes, JJ., concur.

(3398a)

295 - 28571

UNIVERSAL VENDING SERVICE COMPANY,
a corporation,
Appellee,

vs.

VITO POTUTO and S. PASCENTO,
Appellants.

296 - 28572

UNIVERSAL VENDING SERVICE COMPANY,
a corporation,
Appellee,

vs.

JOHN NAPOLETANO and ALFONSO PROBENZANO,
Appellants.

CONSOLIDATED CAUSES
APPEALS FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A.

MR. PRESIDING JUSTICE GAIDLEY DELIVERED THE OPINION OF THE COURT.

These cases have been consolidated for hearing in this appellate court. Both are actions in forcible detainer, commenced in the Municipal Court of Chicago in September 13, 1923. In case No. 28571, plaintiff sought to recover the possession of the "news-stand space and concession space now occupied by Vito Potuto and S. Pascento, on a platform of the Elevated Railroad Station at Madison Street and Wabash Avenue," in the City of Chicago. In case No. 28572, plaintiff sought to recover possession of the news-stand space "on a platform of the Elevated Railroad Station at State and Lake Streets." In each case there was a trial before the court without a jury on September 27, 1923, and at the conclusion of plaintiff's evidence (defendant offering no evidence), the court found defendants guilty of unlawfully withholding the possession and entered judgment against them, and the several appeals were thereafter perfected. The evidence in the two cases was substantially the same.

In the first case it appears that on January 31, 1919,

(3378)

the parties entered into a written agreement under seal, whereby plaintiff (designated as licensor) gave a lease or a licence to defendants (designated as licensees) "to place and maintain in the Madison & Wabash Avenue station of the licensor," at such location as might be designated from time to time by the licensor, "a news-stand space as per plan attached," wherein defendants, under certain conditions mentioned, might sell newspapers, periodicals and other articles of merchandise, consisting of cigars, cigarettes, tobacco and confectionery, from February 1, 1919, to February 28, 1919, "and from month to month thereafter until this license shall be terminated by the licensor upon notice, as hereinafter provided," and wherein defendants agreed to pay to plaintiff for said "privileges" the sum of $180 per month, in advance. The notice referred to is contained in clause fifth of the agreement, as follows: "The licensee hereby expressly agrees that this license may be terminated by the licensor at any time, by giving to the licensee five (5) days' notice in writing of its intention so to do, and in case of such termination by notice the licensor shall pay the proportionate amount of the sum reserved in clause First hereof for the time this license shall remain in force." The other provisions and conditions of the agreement are substantially the same as in the agreement in the case of Universal Vending Service Company v. Demeo, No. 20448, opinion this day filed, to which reference is made. It further appears that defendant entered into the possession of the premises under and pursuant to the agreement; and that on August 30, 1921, plaintiff caused to be served on defendants a written notice, duly signed by plaintiff and dated August 30, 1921, of the termination of their tenancy in said news-stand space, wherein it was stated: "You are hereby notified that your tenancy of the following premises" (describing them) "will terminate and the same is hereby terminated, in accordance with

the terms and conditions of said agreement, on the 11th day of September, A. D. 1923, and you are now hereby required to surrender possession of said premises to the undersigned on that day." It further appears that on September 12, 1923, the defendants were still in the possession of the premises; that on that day plaintiff duly signed, and caused to be served on defendants, a written notice, dated September 12, 1923, demanding "immediate possession" of the premises; that defendants had paid all the accrued monthly rentals of $100, including the month of August, 1923; and that on September 13, 1923, the day the action was commenced, defendants were still in possession.

The evidence in the second case discloses that a similar written agreement was executed by the parties on February 26, 1919, as to a news-stand space in the "State and Lake Street Station of the licensor" for the period beginning on March 1, 1919, and ending on March 31, 1919, "and from month to month thereafter until this license shall be terminated by the licensor upon notice as hereinafter provided," and for the sum of $30 per month in advance; that defendants entered into the possession of the premises under the agreement; that on August 30, 1923, plaintiff served a similar written notice on defendants, notifying them that their tenancy of the premises would terminate under the agreement on September 11, 1923, etc.; that notwithstanding the notice defendants did not vacate, and on September 12, 1923, plaintiff served another notice on defendants demanding immediate possession of the premises; and that at the time the action was commenced and at the time of the trial defendants were still in possession.

Counsel for defendants here contend in substance that the written agreement under its terms is practically a lease, and, upon defendants taking possession of the premises and paying the stipulated monthly rental, established the relation of landlord and tenant between the parties; that the fifth clause

of the agreement, by which defendants expressly agreed that their tenancy might be terminated upon a five (5) days' written notice and under which plaintiff sought to terminate said tenancy on September 11, 1922, by its written notice of August 30th, "is void, as being inconsistent with the lease granted, namely, a tenancy from month to month;" that, under the statute relating to such a tenancy, defendants were entitled to a sixty-day notice in writing; and that, therefore, the judgment in favor of plaintiff for possession was erroneous. Counsel make the further contention that said fifth clause of the agreement is also void, because it is without consideration.

When the agreements were severally executed, and when defendants entered into possession of the several premises, there was in force the following statute (Sec. 6, Landlord & Tenant Act, Hurd's Stat., 1919, p. 1861):

> "In all cases of tenancy by the month, or for any other term less than one year, where the tenant holds over without special agreement, the landlord shall have the right to terminate the tenancy by thirty days notice, in writing, and to maintain an action for forcible detainer or ejectment."

By an act of the legislature, approved and in force April 29, 1921, this statute was so amended as to read as follows (Cahill's Stat. 1921, Chap. 80, Sec. 6):

> "In all cases of tenancy by the month, or for any other term less than one year, where the tenant holds over without special agreement, the landlord shall have the right to terminate the tenancy by sixty days' notice, in writing, until July 1, 1923, and thereafter by thirty days' notice, in writing, and to maintain an action for forcible detainer or ejectment."

It is this last mentioned statute that defendants' counsel refer to in their argument. This statute is still in force, save that it was so amended by the legislature in 1923, that the clause "until July 1, 1923," now reads "until July 1, 1925" (Cahill's Stat. 1923, p. 2134.) But, as we read the statute, it is not applicable to the present case, because de-

fendants are not tenants from month to month holding over without special agreement. They took possession under the special agreement or lease, wherein they were granted a tenancy for one specified month (commencing on the first day and ending on the last day thereof) and "from month to month thereafter until" their tenancy should be terminated by plaintiff giving them a five (5) days' notice in writing of its intention to terminate the tenancy. They were let into the possession of the premises under these terms which they accepted. They occupied the premises for many months under the agreement, paying the stipulated monthly rental, with the understanding that their tenancy might be terminated at any time upon plaintiff giving the 5 days' notice. The tenancy granted after the first month has been held to be in the nature of a tenancy at will. (24 Cyc. 1034.) Or it may be called a "periodic tenancy," as discussed in 1 Tiffany on Landlord and Tenant, pp. 119, 123, 132. But, whatever it may be called, it was created by the express agreement of the parties, subject to the terms and conditions mentioned. And it appears that on August 30, 1932, plaintiff, in accordance with the agreement, duly notified defendants that their tenancies in the respective premises would terminate on September 11, 1932, and that on that day they would be required to surrender possession. This they did not do, and on September 13th plaintiff caused a demand for immediate possession to be served upon them, and, upon their still refusing to deliver up possession, plaintiff commenced the present actions in forcible detainer. We are of the opinion that under the facts disclosed defendants were, unlawfully and in violation of their express agreement, withholding from plaintiff the possession of the premises on September 14, 1932, and that plaintiff was entitled to recover the possession in the present actions by virtue of the provisions

of Sections 1, 3 and 3 of the Forcible Entry and Detainer Act of this State. In section 2 of said Act it is provided in part:

> "Sec. 2. The person entitled to the possession of lands or tenements may be restored thereto in the manner hereafter provided: * *
> Second. When a peaceable entry is made, and the possession unlawfully withheld. * *
> Fourth. When any lessee of the lands or tenements, * *, holds possession without right, after the determination of the lease or tenancy by its own limitations, conditions or terms, or by notice to quit, or otherwise." * *

And we fail to see wherein the fifth clause of the agreement, giving plaintiff the right to terminate the tenancy on 5 days written notice, is without consideration. The giving of the tenancy and allowing defendants to enter into possession under those terms was a sufficient consideration.

The judgments of the Municipal Court in both cases should be affirmed, and it is so ordered.

AFFIRMED.

Fitch and Barnes, JJ., concur.

(3379a)

302 - 28578

UNIVERSAL VENDING SERVICE COMPANY, a corporation,
Appellee,

vs.

GEORGE TRAKAS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 2 10

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer, commenced by plaintiff in the Municipal Court of Chicago on November 5, 1923, against defendant to recover the possession of the news-stand space in the Cicero Avenue Station of the Metropolitan West Side Elevated Railway Co., in the City of Chicago. The case was tried before the court without a jury upon a stipulation of facts, disclosing substantially the same state of facts as in the cases of Universal Vending Service Company v. De Bee, No. 28646, and Same v. Petuto, No. 28671, opinions this day filed, except as to the amount of the monthly rental mentioned in the agreement of the parties, the particular station of the elevated railway company involved, the date of the service of the notice by plaintiff of the termination of the tenancy, etc. The court found the defendant guilty of unlawfully withholding from plaintiff the possession of the premises and entered judgment on the finding against defendant, and he appealed.

Thirty-four similar cases, (Nos. 28573 to 28577, inclusive, and Nos. 28579 to 28607, inclusive), brought by plaintiff against different defendants and affecting similar premises in other stations of said elevated railway company, and in which similar judgments were rendered in the Municipal Court against the respective defendants, have been consolidated for hearing in this appellate court, and one set of briefs has been

(6372)

filed for all the cases by respective counsel.

The grounds relied upon by counsel for defendant in the instant case, as well as in all of said cases here consolidated with it, are the same as in the Petuya case, No. 28571, opinion this day filed. For the reasons indicated in that opinion the judgment of the Municipal Court in the instant case, No. 28578, is affirmed, and the several judgments of the Municipal Court, in cases Nos. 28572 to 28577, inclusive, and in cases Nos. 28579 to 28607, inclusive, are also affirmed.

AFFIRMED.

Fitch and Barnes, JJ., concur.

(3400a)

23695

WILLIAM GOLDSTEIN,
Appellee,

vs.

BURTON AUTO SPRING MNFG. CO., a corporation, MARTIN HANS and VICTOR GREGURICH,
Appellants.

Interlocutory
Appeal from
Circuit Court,
Cook County.

231 I.A. 3_0

MR. PRESIDING JUSTICE BRADLEY DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal taken from an injunctional order of the Circuit Court of Cook County, entered May 24, 1923, wherein the three defendants, and each of them, are enjoined, until the further order of the court,

> "from assigning, transferring, or otherwise disposing of, except in the regular course of business, any of the property, assets or moneys belonging to the defendant, Burton Auto Spring Mnfg. Co., a corporation, or the co-partnership known under the name of Burton Auto Spring Mnfg. Co.; * * from managing or operating Burton Auto Spring Mnfg. Co., a corporation, and its assets, property or moneys, and the said co-partnership known under the name of Burton Auto Spring Mnfg. Co., and its property, assets or moneys, to the damage or injury of the complainant;"

and wherein the defendants, Martin Hans and Victor Gregurich, and each of them, are enjoined, until the further order of the court,

> "from appropriating to their own use any of the property, assets or moneys belonging to Burton Auto Spring Mnfg. Co., a corporation, and the co-partnership known under the name of Burton Auto Spring Mnfg. Co."

Complainant's bill was filed on May 23, 1923, and the injunction was granted without notice, and solely upon the allegations contained in the bill. The prayer of the bill is very long, contained in paragraphs 26 to 41 inclusive, in which both final and temporary relief is asked. The final relief asked is, in substance, for a discovery and an accounting; for the production

Part

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Executors.

Executors.

of the books, records and accounts of the defendant corporation and of the co-partnership of the same name; that certain certificates of stock in the corporation be given to complainant; that complainant be adjudged to be the lawful owner of one-third of the funds and assets of the co-partnership; that the corporation be dissolved, but, if the corporation no longer exists and has been converted into the co-partnership, that said co-partnership be dissolved and the assets sold and the proceeds distributed so as to give one-third thereof to complainant. As to temporary relief the bill prays for the appointment of a receiver; also for an injunction pendente lite, "the necessity of dispensing with notice being apparent from the face of the bill." After an examination of the bill we cannot say that the necessity of dispensing with notice is apparent from its face. The bill is signed by complainant and on the same page appears his affidavit to the effect that he has read the foregoing bill and knows the contents thereof and that the matters and things therein stated are true in substance and in fact, except those matters and things which are therein stated to be upon information and belief, and as to all those matters and things he believes them to be true. Some of the essential allegations of the bill, and upon which the temporary injunction order evidently was predicated, are stated to be made upon information and belief. On the same page of the bill appears the additional affidavit of complainant that "his rights as complainant will be unduly prejudiced if the temporary injunction in this cause is not issued immediately and without notice to the defendants." This is but the statement of his conclusion. No facts are stated justifying the conclusion.

The material allegations of the bill are substantially as follows: The complainant, Goldstein, and the defendants, Hans and Gregurich, in the early spring of 1930, agreed to go

into the business of manufacturing and dealing in automobile springs, each to have a one-third interest. The necessary tools, machinery, etc., were acquired and the title thereto taken in the name of Hans. On April 4, 1920, a Delaware corporation was organized, named Burton Auto Spring Mnfg. Co., with a capital stock of $100,000, ten thousand shares of the par value of $10 each. The entire stock was to be paid up by the parties transferring to the corporation, in the name of Hans, said tools and equipment and $20,000 in cash, and each was to receive one-third of the stock. The tools and equipment and the $20,000 were so transferred; the parties were elected as the three directors; Goldstein became president, Gregurich vice-president and Hans secretary and treasurer; a place of business was opened in Chicago; automobile springs were manufactured and repaired; but by agreement no certificates of stock were issued to any of the parties. About January 1, 1921, after the corporation had been doing business for more than six months, it was determined to increase the capital stock to $200,000, divided into 20,000 shares, and to endeavor to sell the additional 10,000 shares in Illinois. The charter was amended accordingly. For the purpose of complying with the Illinois Securities Law, the parties agreed that 5,000 of the 10,000 shares "originally issued" should be returned to the treasury. As the property and cash originally held in the name of Hans had been transferred by him to the corporation in payment of the original 10,000 shares, but as no certificate for any of said shares had actually been issued, the parties further agreed that the records of the corporation should show that Hans had returned into the treasury said 5,000 shares, instead of showing that complainant had returned 1,666-2/3 shares, and Hans and Gregurich each a like number. In accordance with this agreement, at a special meeting of the directors, held on April 30, 1921, Hans offered to return to the treasury said 5,000 shares and his offer was accepted, and it was further agreed, although no certificates of stock were then issued,

that complainant then owned 1,666-2/3 shares and Hans and Gregurich each a like number. Thereafter the business was conducted upon this understanding, and complainant devoted many hours each day to the business of the corporation and to his duties as the executive head thereof, but he never received anything for his services, and never received from the corporation, although he has made many requests therefor, a certificate for the 1,666-2/3 shares so owned by him. The bill then charges that Hans and Gregurich, as directors and officers of the corporation, fraudulently conspired to deprive complainant of the benefit of his agreements with them, of the 1,666-2/3 shares so owned by him, and of any interest or control of the management of the corporation; that, in pursuance of the conspiracy, and without right, and without authority of the board of directors or of the stockholders of the corporation, and without any new election of officers or directors being held, said defendants, in the early summer of 1921, fraudulently informed complainant that "they no longer desired him as president of the corporation and that he was no longer president," and commanded that he cease acting as president, and refused to allow him to take any part in the management of the corporation or to examine its books and records, which are in their exclusive control; that, although it is provided in the by-laws of the corporation that the annual meeting of the stockholders shall be held in Chicago on the first Monday of April in each year, and directors' meetings shall be held at the Chicago office of the company on the first Monday of each month, no meetings of the stockholders or of the directors have been held since the early summer of 1921; and that since that time Hans has assumed to act as president, although he has never been elected to that office, and he has refused to allow complainant to act as president or as a director. It thus appears from the allegations of the bill that this dispute over the management of the internal affairs of the company, between Hans and Gregurich, majority holders of the stock, and complainant, minority holder,

is not of recent date, but has existed for over two years prior to the filing of the bill. The inference, therefore, is strong that the rights of complainant could not have been unduly prejudiced had notice of the application for a preliminary injunction been given to the defendants. This inference is strengthened by the allegations contained in the 17th and 18th paragraphs of the bill, made upon information and belief, that said defendants, Kane and Gregurich, pursuant to their unlawful scheme and conspiracy to defraud complainant of his stock and without notice to him and without his consent, on or about July, 1931, "attempted to surrender" the Delaware charter of the company, that said "attempt" was a fraud upon complainant, that since said date the business and the assets of the corporation have been handled and controlled by defendants as a co-partnership of the same name as the corporation, and that, if the corporation has surrendered its charter and it is no longer in existence, complainant is a one-third owner of all of the assets of the "supposed" partnership and entitled to a one-third share of its earnings. In paragraph XX of the bill it is alleged, also upon information and belief, that said defendants since July, 1931, have unlawfully carried on the business as a co-partnership, entirely for their own financial gain and not for the benefit of the corporation or the complainant; that the "supposed" partnership has made "large" profits, of which complainant has received nothing; that said defendants have "wasted" the assets of the corporation and the co-partnership, and have converted to their own use moneys and property rightfully belonging to the corporation or to the co-partnership; that they "intend to use various and devious means to decrease the value of the stock of the corporation" owned by complainant, so as to force him to dispose of his stock at a nominal sum; that they "intend to further appropriate and convert to their own use the earnings and profits of the corporation, and/or the co-partnership, rightfully belonging to the corporation and to the complainant."

and that unless defendants are restrained by injunction without notice, as prayed, and unless a receiver of the corporation and of the co-partnership be appointed immediately, complainant will suffer "immediate and irreparable injury." No specific facts are alleged in the bill which justify this conclusion.

It is provided in section 3 of chapter 69 of the Illinois Statutes (Cahill's Stat. 1921):

> "No court, judge or master shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it shall appear, from the bill or affidavit accompanying the same, that the rights of the complainant will be unduly prejudiced if the injunction is not issued immediately or without such notice."

In construing this statute it has been frequently held that, in order to warrant the issuance of an injunction without notice, the complainant must show, either in his sworn bill or the accompanying affidavits, facts from which it can clearly be inferred that his rights will be unduly prejudiced by the giving of notice, and that mere statements of conclusions on the question will not suffice. (Christian Hospital v. People, 303 Ill. 244, 248; Board of Trade v. Gordon, 94 Ill. App. 298, 300; James E. Pepper Distributing Co. v. Walgood, 181 Ill. App. 902, 904.) The injunctional order appealed from was issued without notice solely on the allegations contained in complainant's bill, and, as we read the bill, no facts are therein stated from which it can be clearly inferred that complainant's rights would be unduly prejudiced by the giving of notice to the defendants. Furthermore, some of the essential allegations contained in the bill are not made positively, but upon the belief of complainant from information received, and they are not verified. The complainant only swears in his affidavit to the bill that he believes them to be true. It is also well settled that, in order to warrant the issuance of a temporary injunction without notice, the essential

allegations of a bill must be verified. (Fort Dearborn Life Dermott Co. v. Higdon, 166 Ill. App. 331, 336; Board of Trade v. Riordan, supra; Crawford Mfg. Co. v. Hall, 98 Ill. App. 429, 430.)

The injunctional order appealed from is reversed.

REVERSED.

Fitch and Barnes, JJ., concur.

(340 1/a)

124 - 28400

K. & S. MANUFACTURING COMPANY, a corporation,
Appellee,

vs.

WM. R. JOHNSTON MANUFACTURING COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 611

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action brought by appellee against appellant to recover the price of certain wood frames alleged to have been sold and delivered by the former to the latter.

The issue presented by the pleadings was whether the goods were ordered and delivered, as alleged by appellee. If they were, it is conceded by appellant that the judgment against it should be affirmed, there being no disagreement as to the items or prices.

The only points made by appellant are that the verdict was against the weight of the evidence, and that the conduct of counsel for appellee in conducting the cross examination of Wm. R. Johnston, the president of appellant, constituted reversible error.

The evidence taken on the trial was voluminous, and much of it unnecessary and irrelevant. That on the part of appellee tended to show that appellee was instructed to manufacture the frames in question by Visokey, appellant's foreman, in a telephone conversation with an officer of appellee, on February 25, 1930; that the frames so ordered were made up within the next few weeks; that deliveries were made and accepted of some of them and the rest remained in appellee's factory until some time in November, 1930, when appellee was instructed by appellant to

(3+0/6)

deliver the rest or goods in question to appellant's factory, for which appellant gave the usual receipt.

Appellant's evidence was to the effect that Visekey had no authority to order the frames, and that delivery of the frames to appellant's factory was merely for storage to accommodate appellee.

Appellant was engaged in the manufacture of the Johnston Curtain Window and owned patents for certain designs of the same. The K. & S. Manufacturing Co., was organized for the purpose of manufacturing and supplying appellant with wooden frames for such windows and manufactured several thousand for appellant before receiving the order in question. It was the custom of appellant to give what it called "blanket orders," that is, an order for a certain number of frames to be taken as subsequently specified. These orders were sometimes given orally and sometimes in writing, and sometimes, but not necessarily, followed with written specifications.

Sometime in July, 1920, a conversation was had at appellee's factory with Johnston, appellant's president, with regard to taking out of appellee's storage the goods ordered the previous February. In the following November after another interview or correspondence the goods were shipped, invoiced and deliverees to appellant's storehouse. Payment therefor was subsequently demanded and refused, and this suit was brought to recover the same.

The facts as above stated are practically unquestioned. Johnston testified that Visekey had no authority to order the goods, that a confirmation of all orders in writing was required at that time, and none was given, and that the goods were merely received for storage. But it appears that deliveries of some of the goods so ordered were made and accepted, and that it was not unusual for appellee to fill orders received over the telephone or verbally, or for appellant to accept goods so ordered without

written confirmation.

The witnesses of appellee and appellant differed as to what was said in the July conversation relating to the delivery of these frames. Appellee's witnesses testified in effect to an understanding with appellant's president that appellant would take the frames after receiving a list of them, which appellee proceeded to send by letter on the same date, July 14, 1920, in which he referred to the conversation, and asked for immediate shipping orders. While Johnston claimed that the letter was not called to his attention until November 16th following, yet it tends to confirm appellee's contention of an understanding to take the frames off appellee's hands, as does also appellee's letter of November 16th to appellant, which refers to another conversation on the subject the previous Saturday and states that appellee is mailing an invoice that date "of frames we have been carrying on our floor for approximately eight months, awaiting your disposition." The letter proceeds to say:

> "You will recall that you promised me personally on July 14th to take these frames out as soon as I had given you a list, which was covered by our letter of July 14th, and to which you have made no reference nor paid any attention. As per your promise of Saturday, will you kindly give us shipping instructions on the above frames, which were made to your order, and which should have been taken out quite a few months back."

After that time, in the same month, the frames were delivered to appellant's factory for which it issued its receipt in usual form. The written receipt could not be found, but its issuance was not denied.

We have examined the evidence closely and are unable to say that there was a preponderance of evidence in favor of appellant either on the question of authority to give the order or the acceptance of the goods, and it would serve no useful purpose to detail the conflicting testimony on these points.

The cross examination of Mr. Johnston by appellee's

attorney is criticised for insinuating that Johnston was an habitual litigant, which, of course, had nothing to do with the case. The court sustained such objections as were made, and much of the criticism of appellee's counsel is justified. But we do not think the verdict of the jury could possibly have been influenced by the improper questions. In view of the court's rulings and remarks thereon we think they were more likely to prejudice a reasonable and sensible jury against appellee's counsel than against appellant.

We do not think there was reversible error.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

(3402a)

137 - 28413

EMANUEL M. ROSENTHAL,
Appellee,

vs.

HENRY L. NEWHOUSE,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

2311

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree on a supplemental and amended bill, answer, and an amended cross bill and answer, enjoining defendant Newhouse from interfering with complainant Rosenthal's possession of certain premises as hereinafter stated.

Rosenthal occupies the first floor of a two-story apartment building at No. 5000, Woodlawn avenue, Chicago, under a lease from one Nathan Ascher. Newhouse occupies the second floor apartment and holds the legal title to the entire building and lot it covers. The validity of said lease and use of the "ball room" in the basement are the principal matters in controversy.

The lot was purchased and building erected under a verbal arrangement between defendant and said Nathan Ascher for an equal division of the cost thereof. Pursuant thereto each paid one-half of the purchase price of $12,500 for the lot, the deed to which was taken in the name of Newhouse, but without Ascher's knowledge, and to secure a loan of $25,000 for erection of the building each signed notes and a trust deed to the premises for that loan, and Ascher was to have the first, and Newhouse the second-story apartment. Ascher moved into the first floor in May, 1915, and Newhouse into the second in July,

(3702)

1918. Newhouse is an architect and made the plans and all disbursements and supervised the construction of the building and had the initials of their names, A and N, carved in stone over the entrance. They estimated that it would take $450 per month, half of which each agreed to pay, to take care of the carrying charges, fuel, taxes, janitor's services, etc. On that basis Ascher took care of them for the first six months and Newhouse after that time. The sum was found insufficient and Ascher paid half of the difference when statements thereof were presented by Newhouse, both before and after he leased his apartment to Rosenthal.

The lease was executed in December, 1919, and Rosenthal took possession of the apartment in April, 1920.

Rosenthal and Newhouse differed as to what was said about the lease when they first met and where the conversation took place. But in view of subsequent events these matters are of little importance, for from June, 1920, to June, 1922, it does not appear that Newhouse said or did anything in the nature of a protest or objection to Rosenthal's occupancy of the premises. On the contrary, in that interval they lived on the most friendly terms, exchanging calls, driving out together, and otherwise manifesting friendly relations. Newhouse presented a mirror and ornaments to Rosenthal for his apartment, placed iron guards on the "ball room" windows at Mrs. Rosenthal's request, and in other ways recognized not only Ascher as a tenant in common but Rosenthal's occupancy of Ascher's apartment.

Finally trouble arose over the use of that part of the basement called the "ball room," which was entered both from the hall way of the first apartment and by passing through other basement rooms from an inner stairway leading from the second apartment. Rosenthal placed locks on doors leading directly to the "ball room," but Newhouse was always permitted to use it on re-

quest. On one occasion Newhouse used it for a party of guests and was permitted to enter through Rosenthal's front door and pass through his stairway. But later permission to do so again was refused and after that Newhouse used the rear entrance, and their relations became strained.

On May 26, 1922, Ascher made a written proposition to Newhouse to pay him $6,000 in settlement of the property and an adjoining lot which they had agreed to purchase together, he to release and quitclaim his interests in settlement of all claims and charges against him or that might thereafter arise against him or the property, and Newhouse to assume any mortgages or charges against the property. The proposition was accepted and acted upon. A quit claim deed to the premises in question was never executed, presumably because the title stood in Newhouse's name. After that time Ascher did not collect rent from Rosenthal or continue to pay Newhouse for the carrying charges.

On the first of June, 1923, Newhouse demanded from Rosenthal $50 more rent per month. On the following day he served Rosenthal with a demand for possession of the premises, and on the morning of the third erected a barricade or scaffold in the vestibule leading to Rosenthal's front door. On the latter date the bill for injunction was filed and a temporary injunction granted. On October 28, 1923, Rosenthal exercised an option for the renewal of the lease for two years from April 30, 1925, as provided for therein.

Based on his claim of ownership and that Rosenthal had entered the premises without authorization or legal right and had refused to vacate them Newhouse filed a cross bill for restitution of the premises and to compel Rosenthal to restore the scaffold and pay for the unlawful possession of the premises. Later there was filed an amended and supplemental bill setting up the exercise

of such option and amplifying the allegations of the bill with respect to the relations of the parties to one another and to Ascher. Later the cross bill was amended but it is unnecessary to a consideration of the controlling issues to recite the contents of the pleadings more fully.

Upon a hearing before the court of the issues the court found that complainant was entitled to substantially all of the relief prayed for; that there was an agreement between Newhouse and Ascher for the purchase of such lot, each to contribute one-half of the purchase price thereof; that Newhouse, without Ascher's consent or acquiescence took the legal title thereto in his own name; that they jointly erected said building and jointly executed notes secured by a trust deed upon the premises for the purpose of borrowing $25,000 to be used in erecting the building; that each agreed to contribute one-half of the carrying and maintenance charges of the building, and that they became and continued to be owners and tenants in common of the lot and building from the time of the purchase of the lot and the erection of the building until May 26, 1924, and agreed upon the exclusive, peaceful and undisturbed possession of the apartments aforesaid and for a joint use of the ball room for their respective families; that the lease from Ascher to Rosenthal was made with the knowledge, consent and acquiescence of Newhouse, with the terms of which complainant has fully complied; that Newhouse knew of the lease from Ascher to Rosenthal of the first floor apartment and had acquiesced in and ratified the same in all its terms and provisions, etc., including the option for renewal, and was estopped from questioning or denying complainant's rights under the lease until the expiration of the term, namely, April 30, 1925; that the settlement between Newhouse and Ascher was made as aforesaid whereby Ascher's interest was to cease in

both the lot and building and Newhouse to assume "any mortgages or charges against the building;" that the lease was a charge upon the premises which Newhouse assumed by said agreement, and that Newhouse violated complainant's rights as a lawful tenant in causing the barricade or scaffold to be erected as aforesaid.

The court ordered, adjudged and decreed that the lease was binding for such extended term upon Newhouse, that complainant was entitled to the exclusive and undisturbed possession of the first floor apartment until April, 1925, provided he paid the monthly rental called for by the lease, that the complainant and defendant were jointly entitled to the use of the ball room, and that defendant was not entitled to enter the same through the first floor apartment and had not been excluded therefrom as contended in his cross bill but was allowed to use the same upon request. Newhouse was then perpetually enjoined from interfering with such possession by Rosenthal and his joint use of the ball room and from interfering with Rosenthal's ingress to and egress from the premises and from entering the ball room through the front entrance to the first floor apartment.

It is urged that the decree is not supported by the evidence. With this contention we do not agree. While there is contradictory evidence as to matters more or less immaterial, that relating to the main issues is quite clear and, for the most part, undisputed and supports the findings of the chancellor, which will not be disturbed on review unless clearly against the preponderance of the evidence. (Schreder v. Schreder, 308 Ill. 469; Woodruff v. Day, 278 id. 199.) Reaching the conclusion from a perusal of the evidence that the findings should not be disturbed it is not necessary to detail or discuss the evidence at length.

The principal questions at issue are whether Newhouse and Ascher were tenants in common of the property in question,

and whether Newhouse acquiesced in or ratified the lease in question, and whether he suffered any damages from alleged exclusion from the ball room.

While the evidence indicated that Ascher and Newhouse intended to hold the premises as tenants in common and considered themselves as such, yet it cannot be questioned that as Ascher furnished a definite portion of the purchase money for the lot there was a resulting trust in his favor when Newhouse took title thereto. Such trust arose by operation of law from that state of facts and did not depend on any agreement between them. (Minshaw v. Russell, 280 Ill. 235; Ketring v. Siegand, 286 id. 546, and authorities cited.) Nor was the intention of the parties to create it necessary to its existence. (Baughman v. Baughman, 283 id. 55.) In view, therefore, of the decisive fact that Ascher contributed definite and specific sums toward both the purchase of the lot and the erection and maintenance of the building to which Newhouse took title, it is unnecessary to discuss either the intention of the parties, or why the title was taken in the name of Newhouse, or what oral agreement was had or talked of respecting the deal, whether before or after the erection of the building. Upon the facts as stated they unquestionably held the property until the settlement as tenants in common.

The contention of appellant that the lease of Rosenthal was void because not signed by Newhouse is untenable. It was at least binding on Ascher to the extent of his interest. (Harms v. McCormick, 132 Ill. 104.) While one co-tenant cannot bind the others by a lease of the estate or part thereof without their authority, such lease may nevertheless be ratified by them. (Schwartz v. McQuaid, 214 Ill. 357; Gridley v. Wood, 206 Ill. App. 505.)

The finding in the case at bar that there was such a ratification is amply supported by the evidence. Newhouse admits that he knew from Ascher that he was going to leave, and Rosenthal

was coming into the apartment. He made no protest to Ascher then or afterwards, and it is immaterial whether he told Rosenthal, as he testified, that he was a trespasser and that his lease was not valid, in view of his failure to take any action for over two years, and of his subsequent conduct whereby he recognized in various ways, as above stated, Rosenthal's possession of the premises under the lease. He knew that Rosenthal was paying rent to Ascher and all the time he was receiving from Ascher the latter's share of the expenses of maintaining the building and incidentally Rosenthal's occupancy. It was said in Gridley v. Wood, supra, that a ratification will be presumed when the non-executing co-tenants have knowledge of the lease, make no objections thereto and share in the rents arising from the lease.

Newhouse, having knowledge of the lease, was, under the circumstances, chargeable with such knowledge of its contents as a reasonable, diligent inquiry would disclose, and taking no action to question its validity until after his settlement with Ascher, two years after the lease had run, he was in no position to question it. He should have acted promptly when chargeable with knowledge of the facts. (Greenwood v. Penn, 136 Ill. 146; Hanson v. Gavin, 280 Ill. 354.)

Furthermore, in his settlement with Ascher, Newhouse assumed any "mortgages or charges" against the property. The term "charge" as defined by Bouvier includes "a lien, encumbrance or claim which is to be satisfied out of a specific thing or proceeds thereof to which it applies," and we think the settlement contemplated the inclusion of the lease as such a charge, and also that by such assumption Newhouse recognized the validity of the lease.

While it is unnecessary in this view of the case to discuss whether there was an equitable estoppel, yet there is

much in support of that contention in the facts that Newhouse stood by and allowed Rosenthal to take and continue possession of the premises under the assumed right of Archer to lease them, and encouraged him to believe that he rightfully held such possession. (Whalen v. Schneider, 261 Ill. 587, 588; Loughran v. Gorman, 296 Ill. 46, 49; Oliver v. Rose, 299 Ill. 624, 640.) But the unquestioned arrangement between Archer and Newhouse for the occupancy and maintenance of their respective apartments supports the finding that each was entitled to the exclusive, peaceful and undisturbed possession of his apartment, upon the theory that there was a parol partition thereof followed by possession in conformity therewith whereby each co-tenant had the rights and incidents of exclusive possession of his property. (Tomlin v. Hilyard, 43 Ill. 300); and while such possession cannot transfer the legal title it will be enforced in equity. (Duffy v. Duffy, 243 Ill. 476.)

The evidence also supports the chancellor's finding that the complainant and defendant were jointly entitled to the use of the ball room, that defendant was not excluded therefrom but was allowed to use it on request, and was not entitled to damages. It does not appear that Newhouse was ever denied the use of the basement or ball room, when he wished it. If he did not use it as much as he wished it was because he voluntarily failed to use it. But there must be something more than occupancy of the common property by one and a forbearance by the other to entitle one co-tenant to compensation from the other. (Chapin v. Foss, 75 Ill. 280; Angelo v. Angelo, 146 Ill. 630; Chaney v. Ricks, 187 Ill. 171.

It would extend this opinion to an unreasonable length to analyze the authorities above cited or to distinguish them from those cited in appellant's brief. We find no good ground for reversing the decree, and it will accordingly be affirmed.

(3403a)

246 - 28522

M. J. MILLER,
Appellee,

vs.

CHICAGO AUTOMATIC CONVEYOR COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 311

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action of debt on a foreign judgment to recover $169.10. Default was taken against defendant for want of an affidavit of merits, and the court's finding was for plaintiff for the amount of damages claimed, and judgment was entered thereon.

The points made in appellant's brief are that the court erred in sustaining plaintiff's motion to strike defendant's affidavit of merits and claim of set-off, and in refusing to permit defendant to file an affidavit of merits and set-off, and that he exercised an arbitrary discretion in so doing, and that defendant was prejudiced by the fact that the proceedings were held before a judge not elected to the Municipal Court of Chicago but who was a judge of the city court of Sterling, County of Whiteside, holding a branch of the Municipal Court at the request of judges thereof. But an inspection of the abstract furnished by appellant does not enable us to decide that any one of these contentions is well made. The abstract is a mere index. It does not contain the pleadings, or an abstract of them. We would, therefore, be justified in affirming the judgment, as under the practice of this court it will not search the record to find grounds for

(3402)

reversing the judgment. But an inspection of the record discloses that it contains no bill of exceptions, and that the only way the motions and rulings of the court thereon, upon which appellant predicates his assignment of errors, are made to appear is in the common law record, and, therefore, are not properly preserved for our consideration. In such a state of the record it will be presumed that the action of the court was correct. (Commissioners of Sub-Drainage District v. Carroll 295 Ill. 482, 485.)

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

(3404a)

255 - 28531

ARTHUR HOWELL KNOX,
Appellant,

vs.

ADOLPH D. WEINTHROP,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 311

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit brought to recover on a contract for architect's services. Plaintiff's statement of claim is predicated upon a contract whereby he was to furnish preliminary drawings and specifications for a residence to be erected by defendant, to secure bids, let contracts and supervise and superintend the construction work, for which defendant agreed to pay him six per cent of the reasonable estimated cost of construction. Plaintiff alleged that he furnished such preliminary drawings and specifications and secured bids for the work, the lowest of which was $41,979; that defendant abandoned the erection of the building under the plans and directed plaintiff to proceed no further therewith. Plaintiff claimed he thereby became entitled to be paid a reasonable value of what was done by him, and claimed that the fair, reasonable, usual and customary price for the services performed by him was three and one-half per cent of the total estimated cost of said work, as evidenced by said lowest bid, namely, $1,469.13, of which he alleged there remained due $594.13, with interest.

Defendant's affidavit of merits based his defense upon the claim that plaintiff was directed to prepare plans and specifications and secure bids for a building that would cost not to exceed $25,000; that the estimates were far in excess of what he had directed plaintiff to prepare plans and

specifications for, and that he stands ready to build a house that would cost $25,000 and no more, and had so stated to plaintiff, and has not abandoned the idea of erecting such a residence in accordance with said plans when the cost of material and labor shall enable him to do so; that he has paid plaintiff $875 and is not indebted to him for any further sum.

Defendant also filed a set-off, but it was abandoned.

The trial was had before the court without a jury. Its finding and judgment were for defendant. The only point made on this appeal is that the judgment is contrary to the manifest weight of the evidence. We have examined the same and cannot concur in that contention. Plaintiff and a contractor were his only witnesses, and defendant and his wife and one Irene Frieder were defendant's only witnesses.

It appears that plaintiff's first preliminary sketches were for a house which he estimated would cost $25,000. Defendant required certain changes and larger rooms, which necessitated further sketches. The main dispute is whether it was understood that plaintiff was still to adhere to plans and specifications of a building that would not cost in excess of $25,000. On this point defendant's contention is supported by Miss Frieder, who appears to have been present at the conversations had on the subject. It would appear, however, with the changes made that defendant could not reasonably expect that the house could be built at that figure.

But regardless of the variant testimony on that subject plaintiff, in order to sustain his claim, was bound to prove in accordance with the theory of his action the reasonable value of his services rendered, which consisted of making the preliminary sketches and making the plans and specifications and securing the bids. No direct proof whatever was made of the same. He introduced a letter he sent to defendant after the

work was done which stated that it was the custom and rule of architects to collect for services rendered at the time of the completion of plans and specifications three and one-half per cent of the estimated total cost of the building, and the balance of two and one-half per cent during the progress of the work for superintendence. But there was no proof of the existence of any such custom and rule or that the contract was made with reference to the same. While defendant paid him in all three and one-half per cent of $25,000, "the original estimated cost of the building," and expressed his willingness to go ahead and finish the building when it could be done at a reasonable figure, yet such payment cannot be regarded as supplying a necessity of proof for a reasonable cost of plaintiff's services, which he claimed was nearly $600 more than he was paid. Replying to defendant's letter he also referred to another rule for estimating the value of architect's services when the work was discontinued or abandoned, but no proof of even the existence of such rule was made. While plaintiff went into much detail as to work actually performed by him he made no proof tending to show that there was a specific sum agreed upon for his work or what was the reasonable value of his services. The only witness called by him, a contractor, merely testified as to what was the fair and reasonable cost of construction per cubic foot of a building as outlined in plaintiff's sketches. But this had no tendency to show the value of plaintiff's services.

In view of the fact that plaintiff made no proof to sustain his claim for the reasonable value of his services the court could not do otherwise on the testimony submitted than to render a judgment in defendant's favor. Accordingly the judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

(3405a)

28608

332 - 28608

WILLIAM R. FINNHABER,
Appellee,

vs.

CITY OF CHICAGO et al.,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

231 I.A. 611

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee filed a petition, which was subsequently amended, against appellants for a writ of mandamus commanding them to cause requisitions to be made for ten captains of the fire department of the City of Chicago, to certify and appoint petitioner to the office or position of captain of said department, and to cause him to be promoted or appointed to such office, or in the alternative, if it should appear that requisition and certification had been made on or prior to February 27, 1922, that respondents cause the salary of $2700 per annum to be paid, in monthly installments beginning with March 1, 1922.

After issues were formed by a joint answer, a replication thereto, rejoinders and a similiter, the cause was tried before the court without a jury upon a stipulation of facts, supplemented by oral testimony, and the writ was awarded as prayed.

As stipulated to it appears that the City Council of Chicago by ordinance passed March 13, 1911, established an executive department of the city government known as the fire department, which included various designated offices, among them captains and lieutenants; that the fire marshal was made the head of that department with power to appoint officers and members thereof, according to law, and to remove them accord-

ing to law, and that their salaries or compensation were fixed by the city council in the annual appropriation bill; that as classified by the civil service commission the position of captain was the next higher in rank to that of lieutenant; that the annual appropriation bill of the City of Chicago of 1922 provided for 176 captains at the salary of $2700; that said ordinance provided that "in case of any vacancy in any such position hereby appropriated for, the head of the department in which such vacancy occurs shall not be required to fill the same, if in his judgment and discretion there is no necessity therefor," and that this provision was also in the appropriation bills for the three preceding years and was construed by the fire marshal to give him the power to withhold and withdraw a requisition to certify persons to the position of captain whenever in his judgment and discretion there was no vacancy that needed to be filled.

It also appears that on February 27, 1922, Thomas F. O'Connor, the fire marshal, made a request of the civil service commission to certify to him the names of the persons eligible to appointment to ten vacancies in the position of captain in the fire department; that it was delivered to a clerk in the office of said commission; that the next day, the civil service commission not having acted upon it, Thomas F. Maher, then a battalion chief, assigned to the office of the fire marshal with the duty to prepare requisitions and orders for him and to deliver them, went to the civil service commission, got the requisition and took it away to the office of the fire marshal; that it has never since been returned to or received at the office of the civil service commission, and that said commission never at any time acted upon the same; that at the time of the issuance of said requisition ten names appeared upon the eligible register for the position of captain of the fire department, with their average percentages (being the same ten persons named in

the petition), the first and highest being [illegible]. Firnhaber, the petitioner herein.

It further appears that in 1921 said commission duly ordered and held a promotional examination for the position of captain of said fire department, and on May 20, 1922, compiled and established an eligible register composed of all the names of the persons who successfully passed said examination with the required average; that as a result of such examination and compilation thirteen applicants received a higher average than the aforesaid ten persons; that the fire marshal on that date made a requisition upon the said civil service commission for certification of the names of persons eligible to fill eleven vacancies in said office of captain, and that the civil service commission certified to him the names of said thirteen persons then standing highest on the eligible register, and that the fire marshal appointed from among them the first eleven persons then standing highest on such register.

It also appears that on February 28, 1923, the date after the first requisition referred to was withdrawn, said Maher, by order of the fire marshal, sent to each of the ten persons aforesaid (including said Firnhaber) a notice that he had been assigned to duty as captain in said department, and that later, on the same day, said Maher telephoned each of the battalion chiefs to whom said notices or orders had been sent that they should under orders of the fire marshal return such orders of assignment to the office of the fire marshal, which they did; that the civil service commission had no knowledge of said orders of assignment, and did not authorize or approve of their issuance.

It further appears that from February 27 to April 28, 1923, only 166 captains were in the employ of said fire department.

On April 21, 192[illegible], the petitioner made an oral demand on respondents that a requisition be made for ten captains of the fire department, and that their names be certified for appointment to such positions, and that petitioner be appointed as one of them, and that the salary appropriated for the office for the year 1922 be paid to petitioner from March 1, 1922.

On the hearing respondents called Thomas F. Maher, who testified that on February 28, 1922, he was ordered by the fire marshal, said O'Connor, to go to the civil service commission and return the requisition of February 27, 1922, to his office, which he did, and that later in the afternoon he was ordered by the fire marshal to call the battalion chiefs and have them return the orders sent to them assigning petitioner and others to duty as aforesaid. Petitioner called the fire marshal and undertook to prove by him that he never authorized the recall of said requisition. But his testimony, which is very evasive and irresponsive, does not directly deny that he gave the authority for the withdrawal of said requisition, as testified to by said Maher. After much irrelevant testimony he was asked: "Did you order any one to withdraw the appointment of ten lieutenants to the captaincy?" He answered, "Oh, no; no, we never appointed -" when he was interrupted by counsel. Proceeding with his answer he said: "I never allowed them to be appointed, * * ." He was then asked: "Well, when you did appoint and signed your name to the appointment, did you ever order anybody to withdraw it?" He answered: "never in my life, * * "

Upon this testimony the court overruled the motion of respondents to deny the writ of mandamus, and ordered that the writ be issued.

It will be observed by reference to the testimony of the fire marshal that he did not deny that he issued the order for the requisition, and it is immaterial whether or not he

issued the order for the withdrawal of the assignments to duty for they did not constitute an appointment and, therefore, his answer that he never ordered anybody to withdraw an appointment is aside from the issue. It is clear that there was no legal appointment, and could not be under the civil service law unless the names of the appointees were duly certified from the eligible register. There is no claim or pretense that they were so certified. Such a certification is necessary to a complete and lawful appointment. There was, therefore, no attempted revocation of an appointment since none had been made. (People ex rel. Laist v. Lower, 251 Ill. 577.) In the case cited Laist was certified by the civil service commission from the eligible list to the head of the bureau of public works for appointment as architect. Before any action was taken on the appointment the certification was revoked because Laist was not a licensed architect under the statute. He sought a writ of mandamus to compel his certification to appointment for the position. The court held that the certification having been improvidently granted it was within the power of the civil service commission to correct its mistake by withdrawing the certification, and that under such a state of facts there was no attempted revocation of an appointment, since none had been made.

But it is clear from the evidence that the requisition was withdrawn by the authority of the fire marshal, and if he was lodged with a sound discretion in that matter then there is no ground for this action. That vacancies existed in the position of captain on February 27, 1922, cannot be questioned, for there were only 166 in the service and the appropriation ordinance provided for 176. But if the fire marshal was not vested with a discretion in the matter of issuing a requisition then under the ruling in the cases of People v. Kipley, 171 Ill. 44, 91, and People ex rel. Roderick v. City of Chicago, 283 Ill. 462, 465,

the writ was properly ordered. Under the facts in the last two cited cases it did not appear that the appointing power was vested with a discretion to fill the vacancy. The right to exercise such a discretion by the fire marshal pursuant to the provision in the ordinance aforesaid is not questioned in this case. On the contrary, it is recognized as an existing right both in the petition and the answer thereto. By the pleadings and the testimony the case was reduced to a question of fact as to whether the fire marshal exercised such discretion in the withdrawal of said requisition. No question is raised as to the validity of said ordinance. We are, therefore, not called upon to express any opinion with regard thereto, or, in the absence of any jurisdictional question, to consider any other points than those raised upon this appeal. Assuming, therefore, the validity of the ordinance and construing it as providing for the 176 places only in the event the fire marshal was not required to fill a vacancy if in his judgment and discretion there was no necessity therefor, and finding as a fact from the evidence that he exercised said discretion by withdrawing the requisition before it was acted upon, and it being fundamental that mandamus proceedings will not lie to control the exercise of official discretion, we think the court erred in awarding the writ, and that its judgment must be reversed, especially as no question of fraud or want of good faith in the exercise of said discretion, or of the abuse of it, arises in this case.

We think, too, the fact that the fire marshal two months later issued a new requisition for the ten places in question, and upon due certification of names the positions were filled by his appointment, is tantamount to an admission on his part, and at least presumptive evidence that he either authorized or ratified the withdrawal of the previous requisition and intended the later requisition should be substituted therefor. If it was the

duty of the fire marshal to fill those places, then regardless of whether he had any discretionary power in the matter he has performed that duty, and this action is a mere attempt to infuse vitality in a proceeding that was treated as a nullity by all the officials concerned.

Accordingly the order for the writ will be reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Gridley, P. J., and Fitch, J., concur.

332 - 28605

FINDING OF FACTS.

We find that the requisition issued by the fire marshal of the City of Chicago, February 27, 1922, referred to in the pleadings, was withdrawn by his authority on February 28th, the day after it was delivered to the civil service commission, and was so withdrawn before said commission had acted thereon pursuant to a discretionary power so to be vested in him by an ordinance of the City of Chicago.

(3406a)

333 - 28609

GEORGE CALROW,
Appellee,

vs.

CITY OF CHICAGO et al.,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

231 I.A. 612

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee filed a petition against appellants for a writ of mandamus which, in form and statement of facts, is, with exception of the name of the petitioner, identical with that in Firnhaber v. the same appellants, case No. 28608, in which we have this day filed an opinion reversing the order awarding the writ, with a finding of facts. In both the pleadings and stipulation of facts are also the same. The oral testimony is slightly variant.

Among facts stipulated to were that Thomas F. Maher, a battalion chief in the fire department assigned to the office of the fire marshal, had the duty to prepare requisitions and orders for the fire marshal and deliver them, and that on February 27, 1922, he delivered to the secretary of the civil service commission of Chicago a requisition calling for the appointment of captains in the fire department to fill ten vacancies; that the civil service commission did not act upon such requisition; that said Maher went to the office of the commission, got the requisition, took it away, and delivered it to the office of the fire marshal, and that it has never since been returned to or acted upon by the commission; that also on February 28, 1922, said Maher, by order of the fire marshal, sent to each of the ten persons named in the petition

(including the petitioner herein) an order assigning each of them to the duty of captain, and that on the same day said Maher told each of the battalion chiefs to return said order of assignment under orders of the fire marshal, which they did, and that said orders of assignment were unknown to and unauthorized by said commission. The principal issue of fact in both cases was whether the withdrawal of the requisition was authorized by the marshal, the appointing power.

Respondents undertook to supplement the stipulated facts with oral testimony of said Maher that the withdrawal of the requisition was upon the order and authority of the fire marshal. Such proof was admitted in the Firnhaber case, but over objection was excluded in the instant case upon the theory that it was a verbal order and not given in the presence of the petitioner, neither of which reasons constituted good ground for the exclusion of such evidence. It appears in the record, however, that the court took under advisement without passing directly thereon, a motion to strike out the following answer to the question put to Maher: "How did you come to go up and get that requisition and return it?" The answer was: "The fire marshal, Thomas O'Connor, told me to go to the office of the civil service commission and get that requisition and return it to him." While it would have been consistent with the court's rulings to have stricken out said answer, yet it was not formally done. Similar testimony as to the withdrawal of the assignment orders was also stricken, but in view of what we have said in the opinion in the Firnhaber case the testimony relating to the withdrawal of the assignment orders is immaterial, because the orders in no event constituted a legal exercise of the power of appointment. It appears in both cases that subsequently the fire marshal issued another

requisition to fill the ten places in question, that it was acted upon by the civil service commission, and the places were filled by due appointment of the fire marshal. We said in the Firnhaber case that we regarded such action of the fire marshal as presumptive evidence that he had authorized or ratified the withdrawal of the first requisition and intended to substitute the second one in its place. There was no attempt to deny in this case, as was done in the Firnhaber case, that the fire marshal authorized the withdrawal of the requisition, and there is at least undisputed evidence tending to show that he did. As the case is otherwise in every respect like the Firnhaber case the judgment will be reversed with a finding of facts for the reasons stated in the opinion filed in the latter case.

REVERSED WITH A FINDING OF FACTS.

Gridley, P. J., and Fitch, J., concur.

333 - 28609

FINDING OF FACTS.

We find that the requisition issued by the order of the fire marshal of the City of Chicago, February 27, 1932, referred to in the pleadings, was withdrawn by his authority on February 28th, the day after it was delivered to the civil service commission, and before said commission had acted thereon, pursuant to a discretionary power vested in him by an ordinance of the city council of the City of Chicago.

after

(3407a)

335 - 28611

WILLIAM PARKS,
Appellee,

vs.

CITY OF CHICAGO et al.,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

231 I.A. 612

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee filed a petition against appellants for a writ of mandamus which, in form and statement of facts, is, with exception of the name of petitioner, identical with that in Firnhaber v. the same appellants, case No. 28608, in which we have this day filed an opinion reversing the order awarding the writ, with a finding of facts. The pleadings and the proceedings, including the stipulation of facts and the oral testimony, were substantially the same in this case as in the Firnhaber case, except that instead of the fire marshal testifying in this case his testimony in the Firnhaber case was, over the objection of appellants, read in evidence by appellee's counsel from the witness stand. As the parties in the two cases are not the same, the petitioners being different, and no preliminary showing was made why Thomas F. O'Connor, the fire marshal, was not, or could not, be called in person to testify, the court erred in receiving the testimony he gave in the Firnhaber case.

But even if such evidence were properly received it has no greater force than we have given it in the Firnhaber case where it was not regarded as sufficient to overcome the testimony in behalf of appellants to the effect that the requisition relied upon in this case (which is the same requisition

(3 Feb 72)

as relied upon in the Firnhaber case) was duly withdrawn by the fire marshal, the appointing power, and never acted upon by the civil service commission.

Accordingly the same judgment of reversal, with the same finding of facts, must be entered in this case for the same reasons as stated in our opinion in the Firnhaber case, to which reference is hereby made.

REVERSED WITH A FINDING OF FACTS.

Gridley, P. J., and Fitch, J., Concur.

335 - 28611

FINDING OF FACTS.

We find that the requisition issued by the order of the fire marshal of the City of Chicago February 27, 1922, referred to in the pleadings, was withdrawn by his authority on February 28th, the day after it was delivered to the civil service commission, and was so withdrawn before said commission had acted thereon, pursuant to a discretionary power so to be so vested in him by an ordinance of the city council of the City of Chicago.

(3408a)

140 - 28416

EDWARD E. GORE,
Appellant,

vs.

NATIONAL ASSOCIATION OF CERTIFIED PUBLIC ACCOUNTANTS, a corporation, et al.,
Appellees.

APPEAL FROM
CIRCUIT COURT OF
COOK COUNTY.

231 I.A. 512

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this appeal the appellant seeks to reverse an order of the Circuit Court awarding solicitors' fees to defendants upon the dissolution of a preliminary injunction. The order of the court dissolving the injunction, and the later order dismissing the bill for want of equity, were the subject of a separate appeal. The opinion in that case, which affirms the final order of the Circuit Court, fully states all the facts of the case. (See opinion in number 28417 filed this day.) In this case the record shows that after the dissolution of the injunction a suggestion of damages was filed, in which the defendants claimed they had sustained damages to the extent of $1,000 for solicitors' fees in procuring the dissolution of the preliminary injunction. Several months later the cause came on for hearing upon the question of damages, whereupon the parties stipulated in open court that services were performed by the defendants' solicitors in and about procuring the dissolution of such injunction, that the fair, usual, reasonable and customary charge in Cook County for like services, at the time the same were rendered, is $750, and that "if in the opinion of the court as a matter of law, the complainant herein is liable to the defendants, or either of them, for damages upon the dissolution of said preliminary injunction, said sum of $750

(8708)

Ibn - Saud

Edward J. Hope,

Diplomat,

to,

Political Adviser to
Political Agency, Kuwait,
& Explorations, &c &c.

Diplomacy.

might be allowed as and for solicitors' fees." Upon such stipulation an order was entered reciting the same, and stating, in substance, that it appearing to the court that defendants were damaged by the granting of the injunction, "which said damages are their solicitors' fees," and that as a matter of law the complainant is liable to the defendants therefor, therefore it was ordered "that the complainant forthwith pay" to the defendants the sum of $750 damages, and that the defendants have execution therefor.

Appellant's counsel first renews the argument made in the other appeal above mentioned, as to the merits of the case. Having disposed of that argument by what is said in the opinion filed in that case, it will not be necessary to again state the reasons for our conclusion. The same opinion likewise disposes of the further contention of appellant's counsel that the defendants were only "enjoined from doing things they have no right to do."

It is next urged that the order appealed from does not enter a judgment for the amount assessed, but "contains a mandatory injunction" ordering appellant to "forthwith pay" a specified amount. There is no merit in this contention. The order upon the appellant to forthwith pay the amount assessed amounts to a judgment or decree against the complainant for the amount mentioned, and while, as a matter of form, it might have been better to say that complainant is "ordered, adjudged and decreed" to pay the stipulated amount, the meaning is the same.

The judgment of the Circuit Court will be affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

(3409a)

150 - 28426

REGINA FEDER,
Appellant,

vs.

MIDLAND CASUALTY COMPANY,
a corporation,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

231 I.A. 512

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Appellant sued appellee upon an insurance policy in which David Feder, a son of appellant, was insured against death by accident, and appellant was named as the beneficiary. There was a jury trial in the Circuit Court, and at the close of the plaintiff's evidence the court instructed the jury to find for the defendant. The question involved on this appeal is whether the plaintiff made out a prima facie case of liability under the terms of the insurance policy and the pleadings in the case.

When the suit was first brought the plaintiff filed a declaration consisting of but one count, in which, after reciting the making of the policy on May 13, 1919, it is averred that David Feder was accidentally drowned on July 4, 1919, that on July 8, 1919, plaintiff notified the defendant of that fact, "and at the same time furnished and delivered to defendant satisfactory proof" of such death, that David Feder, during his lifetime complied with all the terms and conditions of the policy, and that since his death plaintiff has "kept, performed, observed and complied with all terms and provisions of the policy," which, by the terms of the policy, are required to be performed by her. The policy, which is set out in haec verba, contains provisions for making proofs of loss, and the insur-

ance is made payable sixty days after such proofs are received. To this declaration the defendant pleaded the general issue. The trial began on November 29, 1921, and was concluded December 5, 1922. There was evidence tending to prove that defendant's agent was informed by telephone of the death of the insured, but there was no evidence tending to prove that formal proofs of loss were ever submitted to the insurance company. At the close of the plaintiff's evidence, by leave of court, the plaintiff filed two additional counts. These counts, while containing the same averments as to the plaintiff's alleged compliance with all the terms and provisions of the policy, further alleged that the defendant had waived the making of formal proofs of loss by denying liability on the alleged ground that the premium had not been paid, and also by failing to furnish plaintiff with forms of proof of loss when requested. To these additional counts defendant pleaded the general issue and two special pleas, one to each additional count, setting up a policy limitation of two years upon the bringing of any suit on the policy, and asserting that the additional counts state causes of action different from the cause of action stated in the original declaration. To these pleas the plaintiff filed a replication asserting that the causes of action were the same. To this replication a demurrer ore tenus was made and sustained, and no further pleading was filed by the plaintiff. The plaintiff excepted to the ruling of the court in sustaining the demurrer, and has assigned error on this ruling; but no argument has been made or authorities cited, in this court, upon this alleged error. It is clear from the record that the court and counsel for both parties in the trial court treated this ruling on the demurrer as in effect sustaining the pleas to the additional counts; and counsel for appellant do not here contend that such was not the legal effect of the court's ruling, and do not deny the assertion in the brief of

appellee's counsel that "as the pleas were pleas in bar, the case rests upon the original declaration and the plea of general issue thereto." The briefs and argument of appellant's counsel, as well as those of counsel for appellee, are based wholly upon the theory thus stated. An assigned error that is not argued in the briefs is deemed to be waived. (International Harvester Co. v. Industrial Board, 282 Ill. 489.) We shall therefore consider only the points raised and argued by counsel in the briefs filed in this court.

The policy provides for the payment of $6,000 by defendant to the plaintiff in case David Feder should lose his life "solely through violent, external and accidental means." Such payment becomes due sixty days "after receipt of due proof." Paragraph 4 of the "standard provisions" of the policy provides that "in event of accidental death immediate notice thereof must be given to the company." Paragraph 5 provides that "such notice, given by or in behalf of the * * * beneficiary * * * to the company at Chicago, Ill., or to any authorized agent of the company, with particulars sufficient to identify the insured, shall be deemed to be notice to the company." Paragraph 6 provides that "upon receipt of such notice" the company "will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss," and that if such forms are not so furnished within fifteen days thereafter, the claimant shall be deemed to have complied with the requirements of the policy as to proof of loss, "upon submitting, within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made." Paragraph 7 provides that in case of a death loss "affirmative proof of loss must be furnished to the company at its said office" within ninety days after the date of such loss.

Edward J. Nitz testified that his business is that

of an insurance agent; that he solicits insurance for the defendant company, collects premiums for it, and adjusts losses for it of less than fifty dollars; that he knew David Feder in his lifetime and "took his application" for insurance, "turned it over to the management," received the policy from defendant, countersigned it (or caused it to be countersigned) as the "duly authorized agent" of the defendant, delivered it to the insured, and "charged the policy" to him.

There is evidence tending to prove that on July 3, 1919, David Feder and four of his friends went from Chicago to Muskegon, Michigan, for a vacation, and on July 5, 1919, he and one of his friends were drowned in Bone Lake, apparently by the upsetting of a canoe in which they, in their bathing suits, were riding; also that the body was recovered two days later and sent back to Chicago, where it was buried on July 11, 1919.

Edward J. Nitz also testified that while the body was at the undertakers' he was informed, by telephone, that David Feder had been drowned, and that he, Nitz, then went and "viewed the body," after which he told the Chicago manager of the defendant company that he "was informed David Feder was drowned," and within sixty days after July 5, 1919, he "wrote a letter to the home office." Upon the request of plaintiff's counsel to produce the original of this letter, counsel for defendant produced a letter, saying, "Here it is," whereupon plaintiff's counsel offered it in evidence. Counsel for defendant objected to its admission on the ground that "waiver is not pleaded, and performance is;" and the court sustained the objection. We have no means of knowing what the letter contained, as it is not copied into the bill of exceptions.

Max Feder, the father of the deceased, testified that four or five days after the funeral, Nitz called upon him at his place of business and told him that "the company refuses to pay

because the premium has not been paid." There is evidence tending to prove that the premium was in fact paid about the time David Feder was drowned, and counsel for appellee do not contend in this court that the foregoing evidence was not sufficient, prima facie, to show that the policy was in force at the time of David Feder's death.

It was further shown that on September 9, 1919, the attorney for the plaintiff sent a letter to the defendant company at its office in Milwaukee, Wisconsin, asking for "such blanks as you require in making proof of death," to be used "in the matter of David Feder, deceased;" and that the defendant replied: "On referring to our records we do not find any legal notice has yet been given of such a loss by the beneficiary, as required by the policy. If you will have the policy complied with, we will be pleased to take whatever action is required." It does not appear that anything further was done by the plaintiff or her counsel.

Defendant's counsel contend that the provisions of the policy above recited required the plaintiff, in order to make out a prima facie case of liability under the averments of her declaration, to prove that written proofs of loss, showing that David Feder was dead, and that he came to his death by accidental means, were submitted to the defendant company within ninety days after such death. Plaintiff's counsel contend that by the language of paragraph 7 of the policy, any "affirmative" proof, though not in writing, of the fact of death by drowning was sufficient proof of loss, and that the oral notice given to defendant's agent, Nitz, followed by his view of the body of the insured, was such affirmative proof.

The provisions of the policy above mentioned make a distinction between a mere "notice of death," which may be oral, and the "proof of loss," which must be in writing. The former

is provided for by paragraphs 4 and 5, and the latter by paragraphs 6 and 7 of the policy. The notice of death must be given immediately, "with particulars sufficient to identify the insured," and such notice may be given to any authorized agent of the company. These provisions are evidently designed to enable the insurance company, after being so notified, to make such immediate investigation as it may deem necessary or advisable to make, in order to determine for itself the fact of death and the identity of the insured. But proof to the effect, merely, that the insured was dead would not, of itself, determine the liability of the company upon an accident policy. It was necessary to prove further that such death was caused by accident, and not by disease or design. Therefore, the next paragraph of the policy provides that "upon receipt of such notice" of death the company will furnish blank forms for the use of the claimant in making proofs of loss, and that if the company fails to furnish such forms within fifteen days, then the claimant, "upon submitting written proof" of loss "within the time fixed in the policy for filing proofs of loss," shall be deemed to have complied with the policy requirements as to proofs of loss. Such written proof must cover "the occurrence, character and extent of the loss," and by paragraph 7, must be furnished to the company within ninety days after the death of the insured. There is no ambiguity in these provisions as to the proofs of loss. Under the specific terms of the policy, written proof must be submitted showing not only that the insured is dead, but also that he came to his death by accidental means. We are unable to agree with the contention of appellant's counsel that the use of the words "affirmative proof of loss" in the seventh paragraph of the policy permits a claimant to submit proofs of loss that are not in writing. To so hold would be to ignore the express provisions of the preceding paragraph. The sixth paragraph purports to cover the matter of making proofs of loss,

and specifically requires "written proof" to be made, while the seventh paragraph merely purports to fix a time limit of ninety days within which such proof must be furnished. There is no contradiction in these paragraphs; they must be read together; and when so read, the word "affirmative" in the seventh paragraph merely emphasizes the character of the written proof which must be submitted within the time fixed.

Appellant's counsel cite the case of Mahalek v. Merchants' Reserve Life Ins. Co., 208 Ill. App. 334, as holding that an oral notice of death is sufficient proof of loss, even where formal proofs are required. The action in that case was upon a life insurance policy. No formal proofs of death were made, but there was proof that notice of the death was given to the president of the company, and the opinion of the court said: "This afforded all the opportunity necessary for the defendant to verify the death and ascertain the cause thereof." We have examined the abstract of the record filed in this court in that case and find that the only provision regarding proofs of loss contained in the insurance policy there in question was a brief provision to the effect that the insurance should be payable to the wife of the insured "upon the presentation of this policy and the receipt and acceptance of satisfactory proofs of death of the insured." The language above quoted from the opinion in that case must be considered in the light of the facts of that case, which are materially different from the facts in this case.

It is next contended that evidence tending to prove that the defendant had waived the policy requirements as to furnishing proofs of loss, was admissible under the averments of the declaration, even though the declaration makes no mention of such a waiver, but, on the contrary, alleges full performance of such requirements. In support of this contention appellant's counsel cite

and rely chiefly upon the case of German Fire Ins. Co. v. Grunert, 112 Ill. 68, and several other cases that cite and follow that case, wherein it was held that proof of such a waiver constitutes an estoppel in pais, and need not be specially pleaded. But in the later cases of Hart v. Carnley Mfg. Co., 231 Ill. 444, and Expanded Metal Fire Proofing Co. v. Boyce, 233 Ill. 284, the doctrine announced in the cases cited by appellant is repudiated, and the correct rule is stated to be "that if the plaintiff intends to rely on facts which shew a waiver of performance by the defendant, he must plead such facts; that he cannot plead performance and recover under proof of waiver of performance." This rule was repeated by the Supreme Court in Walsh v. North American Cold Storage Co., 260 Ill. 322, and by the Appellate Court in Brenton v. Hewlin, 161 Ill. App. 168, and in Mensel v. Capital Live Stock Ins. Co., 219 Ill. App. 77. In the light of these later decisions it must be held that appellant's present contention is not now the law in this state.

The further contention is made that by pleading the general issue alone to the plaintiff's declaration, instead of specially pleading the failure of plaintiff to make and furnish proofs of loss as required by the policy, the defendant admitted that such proofs were furnished. Aside from the fact that appellant's argument on this point ignores the practically universal rule that the plea of the general issue traverses every material allegation of the declaration, this contention is, in effect, merely a repetition, in a different form, of the contention last above mentioned. Appellant's counsel cite upon this point the cases of Kahalek v. Merchants' Reserve Life Ins. Co., supra, and Briggs v. Bankers' Accident Ins. Co., 214 Ill. App. 181. If the opinions in these cases can be considered as holding that where a declaration alleges full performance, such allegation is admitted, without proof, merely because the general issue only

is filed, they are inconsistent with the decisions of the Supreme Court in Hart v. Carsley Mfg. Co., supra, and Expanded Metal Fire Proofing Co. v. Boyce, supra. We know of no reason why the general principle of pleading applied in these cases should not apply to actions on insurance policies as well as to actions on building contracts.

Having reached the conclusion that the plaintiff could not recover under the declaration in this case without showing performance of the contract by submitting written proofs of loss, it will not be necessary to decide whether the evidence was sufficient to show a waiver of such performance.

For the reasons stated, the judgment of the Circuit Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

(3410a)

268 - 28544

TONY STROPOLI,
Appellee,

vs.

BOYDA DAIRY COMPANY,
a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

231 I.A. 241

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $2250 awarded by a jury as damages for injuries claimed to have been sustained by the plaintiff through the negligent driving of an automobile truck belonging to defendant. The accident happened near the intersection of Chicago avenue and Grand avenue, in Chicago. Chicago avenue runs east and west, and Grand avenue runs in a northwesterly and southeasterly direction. Upon both streets there is a double-track street car line. Just before the accident, which occurred in an afternoon in June, the plaintiff was riding east on a Chicago avenue street car. The car stopped at the west side of the Grand avenue intersection and the plaintiff and several other passengers alighted from the rear end of the street car, went behind the street car, and walked in a northerly direction across the east bound track. Three of such passengers preceded the plaintiff, and one was behind him, all apparently intending to transfer to another street car going southeast on Grand avenue. The plaintiff testified that before stepping from behind the street car he stopped and looked east, that he could see twenty-five or thirty feet in that direction, that he did not see anything coming, and walked on. The defendant's servant, driving a light delivery automobile, or truck, was at that moment

(3412)

approaching from the east on the north, or west-bound, street car track. The truck passed alongside of the standing street car from which plaintiff had just alighted, and the left front wheel of the truck struck the plaintiff and knocked him down. The injury he sustained was a compound fracture of the tibia and fibula of his right leg. The witnesses differ as to the rate of speed at which the trukk was then traveling, the plaintiff's witnesses estimating it at twenty-five miles an hour, and the defendant's witnesses at eight or ten miles an hour. The defendant's driver testified that he sounded his horn, but all the plaintiff's witnesses say they heard no horn. The plaintiff's witnesses testified that after striking the plaintiff, the truck did not stop until it reached a point fifty to one hundred feet beyond the place of the accident. The defendant's driver and another witness who was with him testified that when the truck stopped the plaintiff was lying on the street a few feet behind the truck. The driver also testified that he did not see the plaintiff before the accident, but that "I heard somebody bump me at the side and I looked; when I looked he was down." The driver's companion testified that as they passed the street car "one party went by ahead of us, and the other ran right into us;" that the first man was about twenty feet ahead of the truck when he crossed in front of it, and "we kept right on going."

The evidence further shows that the intersection of Chicago avenue and Grand avenue is a busy transfer corner, that the traffic at this point is heavy, and that the buildings on Chicago avenue and Grand avenue are, for the most part, occupied for business purposes, such as factories, garages, restaurants, and saloons, though some of them have living apartments above the first floor.

The case was tried upon a declaration containing four counts. The first count charges negligence generally in the

operation of the defendant's automobile. The second count charges that the automobile was driven "so wilfully and wantonly as to exhibit an entire absence of care for the safety and lives of others." The third and fourth counts charge that the defendant's automobile was operated at a rate of speed greater than the rate specified in the Motor Vehicle Act, the only difference between the two counts being that in the third count the place of the accident is alleged to be a closely built-up business portion of the city of Chicago, while the fourth count charges that such place is a residence portion of such city. To all these counts the plea of general issue was filed. Special findings were submitted by the defendant to be answered by the jury, and upon these the jury found that defendant was guilty of wantonness and recklessness in driving and managing the automobile; that the place of the accident was a business district, and not a residential district, and that defendant was guilty of the negligence charged in the declaration "or some count thereof."

At the close of all the evidence the defendant moved the court to instruct the jury to disregard the second, third and fourth counts of the declaration upon the ground that there was no proof to sustain the same, and tendered written instructions to that effect. The court denied the motion and refused the instruction. Error is assigned on this ruling. There was some evidence tending to prove the cause of action as stated in each of those counts. But if such were not the fact, there was certainly evidence tending to prove the cause of action as stated in the first count, and where this is true as to any one count, it is not reversible error to refuse to instruct the jury to disregard other counts which are not supported by the evidence. (Scott v. Parlin & Orendorff Co., 245 Ill. 460; Heidenreich v. Bremner, 260 Ill. 439, 446.

Defendant tendered six instructions on the question of contributory negligence. As tendered, all of them were bad, for the reason that each told the jury that there could be no recovery except upon proof that the plaintiff exercised due care for his own safety. That statement was a correct statement of the law applicable to the first, third and fourth counts of the declaration, but was not a correct statement of the law applicable to the second count, wherein the injury is charged to have been caused by the willful and wanton conduct of the defendant; and there was nothing in the offered instructions which stated this exception to the general rule as to the effect of contributory negligence. The court modified each of these offered instructions by inserting therein a clause, or a sentence, excluding a willful and wanton injury from the rule therein stated, and gave the instructions as thus modified. Defendant's counsel does not contend that the instructions as so modified were not accurate statements of the law, but complains that the repetition in each of these six instructions of the exception mentioned tended to unduly emphasize that feature of the case. We think this complaint is not well founded; but, if it were, the error, if any, in this respect was invited by defendant when it offered so many instructions on the same point, - all of which were correct except as above noted - thereby requiring the court either to refuse them altogether - in which case there would have been no instructions given touching the question of contributory negligence - or to modify them as he did.

It is also insisted that the definition of wilful and wanton misconduct as given by the court in modifying another of defendant's instructions, is inaccurate. To an instruction which told the jury that unless they found from the evidence that defendant's servant "wilfully and wantonly drove the said car upon the defendant," they must find the defendant not guilty "under

that count," the court added the following: "that the words 'wilful' and 'wanton', as used in these instructions, means, in law, such a degree of carelessness and recklessness as to exhibit an entire absence of care for, and disregard for, the safety and lives of others, from which the law implies wilfulness and wantonness." The criticism of this definition made by defendant's counsel is that it omits "the material element that the conduct should be such as exhibits a conscious indifference to consequences." We think the criticism is not well taken. The element of conscious indifference to consequences is embodied in the definition as given by the court, in the words "such a degree of carelessness and recklessness as to exhibit an entire absence of care for, and disregard for, the safety and lives of others." In Berliner v. I. C. R. R. Co., 296 Ill. 464, the court said: "Where the omission to exercise care is so gross that it shows a lack of regard for the safety of others, it will justify the presumption of wilfulness or wantonness."

It is insisted that there is no evidence of wilful or wanton misconduct on the part of the defendant's driver. We cannot agree with this contention. In passing a street car stopped for the discharge of passengers at a busy transfer corner, such as the evidence shows this was, the defendant's driver was bound to take notice of the fact that at any moment passengers alighting therefrom might reasonably be expected to cross his path from behind the street car. Moreover, the driver's companion testified that he saw one passenger doing this very thing, and other witnesses testified that three passengers preceded the plaintiff in crossing the north track. No explanation was given by the driver for his alleged failure to see these persons crossing ahead of him, and he is therefore chargeable with knowledge of facts which a reasonable exercise of his faculties would have enabled him to see and to know. It was his duty,

under such circumstances, to take such reasonable precautions as the circumstances required to avoid injury to such passengers. Instead of doing so, the defendant's driver, with heedless indifference and a total disregard of consequences, ran his automobile past and directly alongside of the street car at a high rate of speed, directly into the path of those whom he knew, or by the exercise of reasonable care should have known, might cross the north street car track directly in front of him. We think it is reasonably clear from all the evidence that the exercise of the slightest care on the part of the defendant's driver would have avoided the accident. We have carefully examined the evidence contained in the transcript and we are unable to say that the jury were not justified in finding from the evidence, as they did, specifically that the "defendant's servant was guilty of wantonness or recklessness in driving and managing the car in question."

The first four instructions given for the plaintiff told the jury what, in substance, were the allegations contained in the declaration, one instruction for each count. Each of such instructions concludes with the statement that if the jury find from a preponderance of the evidence that the plaintiff has proven his case as alleged in said count, the jury should find the defendant guilty. Defendant's counsel complains that these instructions in effect submit the pleadings to the jury. There is no merit in the complaint. The form of these instructions follows the proper practice as indicated in McFarlane v. Chicago City Ry. Co., 288 Ill. 470, 485; Bernier v. I. C. R. R. Co., 296 Ill. 464, 473; Laughlin v. Hopkinson, 292 Ill. 80, 85; and Krieger v. Aurora, Elgin & Chicago R. R. Co., 242 Ill. 544.

Defendant's counsel finally insists that it was error to give two instructions based upon the third and fourth counts of the declaration, charging a violation of the Motor Vehicle Act,

for the alleged reason that each of such counts avers that the public highway upon which the accident happened was within the corporate limits of the city of Chicago, and there is no proof of that fact. It is true that there is no direct evidence that Chicago avenue at its intersection with Grand avenue is within the city limits. Upon the trial, it seems to have been assumed by both sides that such was the fact and it does not appear that this alleged failure of proof was mentioned at any time in the trial court by motion, exception, or otherwise. However, if the objection here made for the first time can be considered in the absence of any ruling thereon in the trial court, we think it is answer enough to say that there is some evidence, slight though it may be, from which the alleged missing fact may be fairly and reasonably inferred. It appears from the evidence that the street cars upon both Chicago avenue and Grand avenue at the time of the accident were cars of the Chicago Surface Lines and that a conductor of one of such street cars who was standing at the corner and witnessed the accident, made a report of the same to the street car company, which report was read to the jury and which shows upon its face that it was written in "Chicago, Illinois, June 7, 1911," states that the conductor was "waiting for a Kedzie car at Grand and Chicago," and then goes on to describe the accident as he saw it. If the streets so mentioned were located anywhere else than in the city of Chicago (as, for example, in the city of Evanston, or the village of Oak Park) it is reasonable to assume that the conductor's report would have so stated; and it is also reasonable to assume that double track street car lines, operated under the name of the Chicago Surface Lines, are not likely to be found in operation outside of the city of Chicago. Doubtless such circumstances alone would not be of much weight if there was any evidence to the contrary; but there is none. Furthermore, in view of the fact that the jury specially found the defendant

guilty upon the second count, which is not based on the Motor Vehicle Act, we cannot see that defendant has been harmed in any way by the giving of such instructions, even if the proof above mentioned is not sufficient to overcome the objection stated.

The judgment of the Superior Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

(341a)

173 - 28449

UNIVERSAL VENDING SERVICE COMPANY, a corporation,
Appellee,

vs.

TONY DEMEO,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I.A. 513

PER CURIAM.

This is an action in forcible detainer, commenced in the Municipal Court of Chicago on November 5, 1928, to recover the possession of the "news-stand space and concession space now occupied by Tony Demeo in the Western Avenue Station of the Humboldt division of the Metropolitan West Side Elevated Railway Company," in the city of Chicago. The cause was tried before the court without a jury upon a stipulation as to the facts, and the court found defendant guilty of unlawfully withholding from the plaintiff the possession of the premises, and entered judgment upon the finding against defendant. This appeal followed.

The agreed facts are substantially the same as in case No. 28448, in which an opinion has this day been filed, wherein plaintiff sought to recover from defendant the possession of the news-stand and concession space in the Garfield Park station of said elevated railway company. For the reasons stated in the opinion in case No. 28448, the judgment in the instant case is affirmed.

AFFIRMED.

(3412a)

296 - 28572

UNIVERSAL VENDING SERVICE COMPANY,
a corporation,
Appellee,

vs.

JOHN NAPOLENTANO and ALFONSO PROBENZANO,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

PER CURIAM. 231 I.A. 613

This case has been consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. Vito Fonte and M. Pascente, No. 28671.

For the reasons indicated in the opinion this day filed in that case, the judgment of the Municipal Court of Chicago in the instant case is affirmed.

AFFIRMED.

(3413a)

297 - 28573

UNIVERSAL VENDING SERVICE COMPANY, a corporation, Appellee, vs. GEORGE ALEXANDER, Appellant.	Appeal from Municipal Court of Chicago.

PER CURIAM. 231 I.A. 213

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascento, No. 28571, the judgment of the Municipal Court of Chicago in the instant case is affirmed.

AFFIRMED.

(3473)

(3414a)

298 - 28574

UNIVERSAL VENDING SERVICE COMPANY, a corporation, Appellee, vs. JERARDO ALTIERE, also known as J. K. ALTIERE, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

PER CURIAM. 231 I.A. 613

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Fotuto and Pascento, No. 28571, the judgment of the Municipal Court of Chicago in the instant case is affirmed.

AFFIRMED.

(3415a)

299 - 28575 28575

UNIVERSAL VENDING SERVICE COMPANY, a corporation,
Appellee,

vs.

DOM DE LEONARDIS,
Appellant.

Appeal from
Municipal Court
of Chicago.

2311 A. 31

PER CURIAM.

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Patsis and Pascente, No. 28571, the judgment of the Municipal Court of Chicago in the instant case is affirmed.

AFFIRMED.

(3415)

(3416a)

300 - 28576

UNIVERSAL VENDING SERVICE COMPANY,
a corporation,
Appellee,

vs.

L. ADDUCI, also known as LOUIS ADDUCI,
Appellant.

Appeal from
Municipal Court
of Chicago.

231 I.A.-1

PER CURIAM.

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascento, No. 28571, the judgment of the Municipal Court of Chicago in the instant case is affirmed.

AFFIRMED.

(3417a)

301 - 28577

UNIVERSAL VENDING SERVICE COMPANY, a corporation,
Appellee,

vs.

JERARDO ALTIERE, also known as J. K. ALTIERE,
Appellant.

Appeal from Municipal Court of Chicago.

PER CURIAM. 231 I.A. 614

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potato and Pascente, No. 28571, the judgment of the Municipal Court of Chicago in the instant case is affirmed.

AFFIRMED.

(3418a)

303 - 28579

UNIVERSAL VENDING SERVICE COMPANY, a corporation,
Appellee,

vs.

SPEROS NOTOS,
Appellant.

Appeal from
Municipal Court
of Chicago.

23114 C 1

PER CURIAM.

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascente, No. 28571, the judgment of the Municipal Court of Chicago in the instant case is affirmed.

AFFIRMED.

(3418)

(3419a)

304 - 28580

UNIVERSAL VENDING SERVICE COMPANY, a corporation,
Appellee,

vs.

MRS. NARCO ALISHAHON,
Appellant.

Appeal from
Municipal Court
of Chicago.

PER CURIAM. 231 I.A. 314

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascente, No. 28571, the judgment of the Municipal Court of Chicago in the instant case is affirmed.

AFFIRMED.

(3420a)

✓ 305 - 28581

UNIVERSAL VENDING SERVICE COMPANY, a corporation, Appellee, vs. JAMES ARGEREZ, Appellant.	Appeal from Municipal Court of Chicago.

PER CURIAM.

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trukas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Lascento, No. 28571, the judgment of the Municipal Court of Chicago in the instant case is affirmed.

AFFIRMED.

(342 1a)

306 - 28582

UNIVERSAL VENDING SERVICE COMPANY, a corporation,
Appellee,

vs.

HARRY G. ALBECK, also known as HARRY ALLECK,
Appellant.

Appeal from
Municipal Court
of Chicago.

PER CURIAM.

231 I. A. 15

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Fotuto and Pascento, No. 28571, the judgment of the Municipal Court of Chicago in the instant case is affirmed.

AFFIRMED.

(3422a)

307 - 28583

UNIVERSAL VENDING SERVICE COMPANY, a corporation, Appellee, vs. VITO PACELLI, Appellant.	Appeal from Municipal Court of Chicago.

PER CURIAM. 231 I.A. 615

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Petuto and Pascento, No. 28571, the judgment of the Municipal Court of Chicago in the instant case is affirmed.

AFFIRMED.

(3423a)

308 - 28584

UNIVERSAL VENDING SERVICE COMPANY, a Corporation,
Appellee,

v.

BENNIE GOLD,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I.A. 615

PER CURIAM.

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascento, No. 28571, the judgment of the Municipal court of Chicago in the instant case is affirmed.

AFFIRMED.

No. 1220.

(3424a)

309 - 28585

UNIVERSAL VENDING SERVICE COMPANY, a Corporation,
Appellee,

v.

MRS. ETTA COHEN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I. A. 315

PER CURIAM.

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Petuto and Pascento, No. 28571, the judgment of the Municipal court of Chicago in the instant case is affirmed.

AFFIRMED.

(3425a)

✓ 310 - 28586

UNIVERSAL VENDING SERVICE COMPANY, a Corporation, Appellee, v. FRANK INDELLI, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I. A. 315

PER CURIAM.

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Patuto and Pascenio, No. 28571, the judgment of the Municipal court of Chicago in the instant case is affirmed.

AFFIRMED.

This case was consolidated for review in this
appellate court with the case of Mahoney Insurance Corp. v.
Bowman v. Farmers Trading, No. 83076.

For the reasons indicated in the opinion this day
filed in the cl.Ct case of Universal Textile Service Insurance
v. Zenith and Electronics, No. 39071, the judgment of the Industrial
Board of Chicago in the instant case is affirmed.

Affirmed.

(3426a)

311 - 28587

UNIVERSAL VENDING SERVICE COMPANY, a Corporation, Appellee, v. MRS. MINNIE PETTY, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

PER CURIAM. 231 I.A. 615

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascento, No. 28571, the judgment of the Municipal courtof Chicago in the instant case is affirmed.

AFFIRMED.

(3427a)

312 - 28588

UNIVERSAL VENDING SERVICE COMPANY, a Corporation,
Appellee,

v.

ANTONIO IACULLO, also known as TONY IACULLO,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I. A. 315

PER CURIAM.

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28573.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Petuto and Pascento, No. 28571, the judgment of the Municipal court of Chicago in the instant case is affirmed.

AFFIRMED.

(3428a)

313 - 28589

UNIVERSAL VENDING SERVICE COMPANY, a Corporation,
Appellee,

vs.

MRS. FANNY BRAEUNIGER, also known as Fannie Braenninger,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I 316

PER CURIAM.

This case was consolidated for hearing in this appellate courtwith the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascente, No. 28571, the judgment of the Municipal courtof Chicago in the instant case is affirmed.

AFFIRMED.

(3429a)

✓314 - 28590

UNIVERSAL VENDING SERVICE COMPANY, a Corporation,
Appellee,

v.

M. PALUMBO,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

PER CURIAM. 231 I.A. 216

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascento, No. 28571, the judgment of the Municipal court of Chicago in the instant case is affirmed.

AFFIRMED.

AFFIRMED.

(3430a)

315 - 28591

UNIVERSAL VENDING SERVICE COMPANY, a Corporation, Appellee,

v.

M. PALUMBO, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

PER CURIAM. 231 I.A. 316

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascente, No. 28571, the judgment of the Municipal court of Chicago in the instant case is affirmed.

AFFIRMED.

(3431a)

316 - 28592

UNIVERSAL VENDING SERVICE COMPANY, a Corporation, Appellee, v. VICHO MURRO, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

PER CURIAM. 231 I.A. 616

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Petuto and Paganio, No. 28571, the judgment of the Municipal court of Chicago in the instant case is affirmed.

AFFIRMED.

(B43/6)

(3432a)

317 - 28593

UNIVERSAL VENDING SERVICE COMPANY, a Corporation,
Appellee,

v.

VITO SARACCO,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

PER CURIAM. 231 I.A. 316

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascente, No. 28571, the judgment of the Municipal courtof Chicago in the instant case is affirmed.

AFFIRMED.

(3433a)

✓318 - 28594

UNIVERSAL VENDING SERVICE COMPANY, a Corporation, Appellee, v. NICK DECAOVA, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I.A. 616

PER CURIAM.

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascento, No. 28571, the judgment of the Municipal court of Chicago in the instant case is affirmed.

AFFIRMED.

(3434a)

319 - 28595

UNIVERSAL VENDING SERVICE COMPANY, a Corporation, Appellee, v. NICK DECAOVA, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I.A. 317

PER CURIAM.

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascente, No. 28571, the judgment of the Municipal court of Chicago in the instant case is affirmed.

AFFIRMED.

(3435a)

320 - 28596

UNIVERSAL VENDING SERVICE COMPANY, a Corporation,
Appellee,

v.

NICK DECAOVA,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

PER CURIAM. 231 I.A. 317

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascente, No. 28571, the judgment of the Municipal court of Chicago in the instant case is affirmed.

AFFIRMED.

(3436a)

321 - 28597

UNIVERSAL VENDING SERVICE COMPANY, a Corporation,
Appellee,

v.

FRANK CAPONIGRI, also known as F. CAPONIGRI, and J. DE LEONARDIS,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

291 I.A. 317

PER CURIAM.

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascento, No. 28571, the judgment of the Municipal court of Chicago in the instant case is affirmed.

AFFIRMED.

(3437a)

322 - 28598

UNIVERSAL VENDING SERVICE COMPANY, a Corporation, Appellee, v. FRANK CAPONIGRI, also known as F. CAPONIGRI, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

PER CURIAM. 23 [illegible] 17

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascente, No. 28571, the judgment of the Municipal court of Chicago in the instant case is affirmed.

AFFIRMED.

(3438a)

323 - 28599

UNIVERSAL VENDING SERVICE COMPANY,
a Corporation,
Appellee,

v.

JAMES ALFREDO,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 A. 217

PER CURIAM.

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascento, No. 28571, the judgment of the Municipal court of Chicago in the instant case is affirmed.

AFFIRMED.

(37+378)

[illegible]
[illegible] - 3899

[illegible]
[illegible],

[illegible]

v.

[illegible],

[illegible].

[illegible]

[illegible]

[illegible]

[illegible]

This case was submitted for hearing in Tribe
[illegible] court with the case of [illegible]
v. [illegible], No. [illegible].

For the reasons indicated in the opinion [illegible]
filed in the similar case of [illegible]
v. [illegible] and [illegible], No. [illegible], the judgment of the [illegible]
court of Chicago in the instant case is affirmed.

[illegible]

(3439a)

324 - 28600

UNIVERSAL VENDING SERVICE COMPANY, a Corporation,
Appellee,

v.

JOE BENELLI,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I.A. 317

PER CURIAM.

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Petuta and Passante, No. 28571, the judgment of the Municipal court of Chicago in the instant case is affirmed.

AFFIRMED.

(3440a)

325 - 28601

UNIVERSAL VENDING SERVICE COMPANY, a Corporation,
Appellee,

v.

CARMIN IACULLO,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

2311 I 73

PER CURIAM.

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Faccento, No. 28571, the judgment of the Municipal court of Chicago in the instant case is affirmed.

AFFIRMED.

(3440.)

(3441a)

326 - 28602

UNIVERSAL VENDING SERVICE COMPANY, a Corporation, Appellee, v. JOE FERRONE, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

PER CURIAM. 231 I.A. 618

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Petuta and Pascente, No. 28571, the judgment of the Municipal court of Chicago in the instant case is affirmed.

AFFIRMED.

(3rd Ed.)

Case 3:

Petitioner, Counsel for Petitioner,
& Counsel for,

Plaintiff,

v.

Defendant.

Petition for Writ of Habeas
Corpus to be Issued.

Date of Petition, 2 3 1 . . 1 9

This case was originally for hearing in this
Appellate Court with the name of Unreported Trading Company
v. Charles Taylor, Jr., Creditor.

On the reasons indicated on the opinion this day
filed in the ability case of Unreported Trading Company
v. Taylor and Associates, Jr., Creditor, the Judgment of the Municipal
Court of Chicago in the instant case is affirmed.

Affirmed.

(3442a)

327 - 28603

UNIVERSAL VENDING SERVICE COMPANY, a Corporation, Appellee, v. D. CATENA, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I.A. 318

PER CURIAM.

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascente, No. 28571, the judgment of the Municipal court of Chicago in the instant case is affirmed.

AFFIRMED.

(3447 2 a)

(3443a)

328 - 28604

UNIVERSAL VENDING SERVICE COMPANY, a Corporation,
Appellee,

v.

M. PALUMBO,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I.A. 612

PER CURIAM.

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Petuto and Fascento, No. 28571, the judgment of the Municipal court of Chicago in the instant case is affirmed.

AFFIRMED.

(3443a)

223 - 1960

(3444 a)

329 - 28605

UNIVERSAL VENDING SERVICE COMPANY, a corporation, Appellee,	APPEAL FROM
vs.	MUNICIPAL COURT
M. and G. PALUMBO, also known as MIKE and JIM PALUMBO, Appellants.	OF CHICAGO.

231 I.A. 318

PER CURIAM.

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascento, No. 28271, the judgment of the Municipal Court of Chicago in the instant case is affirmed.

AFFIRMED.

(34452)

330 - 28606

UNIVERSAL VENDING SERVICE COMPANY, a corporation, Appellee, vs. T. SEGREDO, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I.A. 318

PER CURIAM.

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascento, No. 28571, the judgment of the Municipal Court of Chicago in the instant case is affirmed.

AFFIRMED.

(3446a)

331 - 28607

UNIVERSAL VENDING SERVICE COMPANY, a corporation, Appellee, vs. ONOFRIO SERRITELLA, also known as ONIFERRO SERRITELLA, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

PER CURIAM. 231 I.A. 619

This case was consolidated for hearing in this appellate court with the case of Universal Vending Service Company v. George Trakas, No. 28578.

For the reasons indicated in the opinion this day filed in the similar case of Universal Vending Service Company v. Potuto and Pascento, No. 28571, the judgment of the Municipal Court of Chicago in the instant case is affirmed.

AFFIRMED.

(347a)

334 - 28610

JOHN W. O'CONNOR,
Appellee,

vs.

CITY OF CHICAGO et al.,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

231 I.A. 10

PER CURIAM.

Appellee filed a petition against appellants for a writ of mandamus in the same form and setting up the same state of facts as in the case of Firnhaber v. the same appellants, No. 28608, in which we have this day filed an opinion reversing the order awarding the writ, with a finding of facts. The pleadings, stipulation of facts and oral evidence and rulings of the court in this case are precisely like those in the case of No. 28609, George Calbow v. City of Chicago et al., in which we have this day filed an opinion holding in effect that the case is no different in its essential features from the Firnhaber case, supra, in which we have also filed an opinion this day, reversing the judgment with a finding of facts. For the reasons stated in the latter case the judgment in the present case will be the same.

Accordingly the judgment will be reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

334 - 28610

FINDING OF FACTS.

We find that the requisition issued by the order of the Fire Marshal of the City of Chicago, February 27, 1923, referred to in the pleadings, was withdrawn by his authority on February 28th, the day after it was delivered to the civil service commission, and was so withdrawn before said commission had acted thereon, pursuant to a discretionary power so to do vested in him by an ordinance of the city council of the City of Chicago.

(3448a)

336 - 28612

JOHN GONDEK,
Appellee,

vs.

CITY OF CHICAGO et al.,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

PER CURIAM. 231 I.A. 519

Appellee filed a petition against appellants for a writ of mandamus in the same form and setting up the same state of facts as in the case of Firnhaber v. the same appellants, No. 28608, in which we have this day filed an opinion reversing the order awarding the writ, with a finding of facts. The pleadings, stipulation of facts and oral evidence and rulings of the court in this case are precisely like those in the case No. 28609, George Calbow v. City of Chicago et al., in which we have this day filed an opinion holding in effect that the case is no different in its essential features from the Firnhaber case, supra, in which we have also filed an opinion on this day, reversing the judgment with a finding of facts. For the reasons stated in the latter case the judgment in the present case will be the same.

Accordingly the judgment will be reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Accordingly the Judgment will be reversed with costs.

336 - 28612

FINDING OF FACTS.

We find that the requisition issued by the order of the fire marshal of the City of Chicago, February 27, 1923, referred to in the pleadings, was withdrawn by his authority on February 28th, the day after it was delivered to the civil service commission, and was so withdrawn before said commission had acted thereon, pursuant to a discretionary power so to do vested in him by an ordinance of the city council of the City of Chicago.

(3449a)

337 - 28613

FRANK C. HAWLEY,
Appellee,

vs.

CITY OF CHICAGO et al.,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

231 I.A. 619

PER CURIAM.

Appellee filed a petition against appellants for a writ of mandamus in the same form and setting up the same state of facts as in the case of Firnhaber v. the same appellants, No. 28608, in which we have this day filed an opinion reversing the order awarding the writ, with a finding of facts. The pleadings, stipulation of facts and oral evidence and rulings of the court in this case are precisely like those in the case of No. 28609, George Calbow v. City of Chicago et al., in which we have this day filed an opinion holding in effect that the case is no different in its essential features from the Firnhaber case, supra, in which we have also filed an opinion this day, reversing the judgment with a finding of facts. For the reasons stated in the latter case the judgment in the present case will be the same.

Accordingly the judgment will be reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Finding of Fact.

Plaintiff's Exhibit "A".

Plaintiff's Exhibit "B".

Plaintiff's Exhibit "C".

Plaintiff's Exhibit "D".

Plaintiff's Exhibit "E".

Plaintiff's Exhibit "F".

Plaintiff's Exhibit "G".

Plaintiff's Exhibit "H".

Plaintiff's Exhibit "I".

Plaintiff's Exhibit "J".

Plaintiff's Exhibit "K".

Plaintiff's Exhibit "L".

Plaintiff's Exhibit "M".

Plaintiff's Exhibit "N".

Plaintiff's Exhibit "O".

Plaintiff's Exhibit "P".

Plaintiff's Exhibit "Q".

Plaintiff's Exhibit "R".

Plaintiff's Exhibit "S".

Plaintiff's Exhibit "T".

Plaintiff's Exhibit "U".

Plaintiff's Exhibit "V".

Plaintiff's Exhibit "W".

Plaintiff's Exhibit "X".

Plaintiff's Exhibit "Y".

Plaintiff's Exhibit "Z".

Plaintiff's Exhibit "AA".

Plaintiff's Exhibit "BB".

Plaintiff's Exhibit "CC".

Plaintiff's Exhibit "DD".

Plaintiff's Exhibit "EE".

Plaintiff's Exhibit "FF".

Plaintiff's Exhibit "GG".

Plaintiff's Exhibit "HH".

Plaintiff's Exhibit "II".

Plaintiff's Exhibit "JJ".

Plaintiff's Exhibit "KK".

Plaintiff's Exhibit "LL".

Plaintiff's Exhibit "MM".

Plaintiff's Exhibit "NN".

Plaintiff's Exhibit "OO".

Plaintiff's Exhibit "PP".

Plaintiff's Exhibit "QQ".

Plaintiff's Exhibit "RR".

Plaintiff's Exhibit "SS".

Plaintiff's Exhibit "TT".

Plaintiff's Exhibit "UU".

Plaintiff's Exhibit "VV".

Plaintiff's Exhibit "WW".

Plaintiff's Exhibit "XX".

Plaintiff's Exhibit "YY".

Plaintiff's Exhibit "ZZ".

Plaintiff's Exhibit "AAA".

Plaintiff's Exhibit "BBB".

Plaintiff's Exhibit "CCC".

Plaintiff's Exhibit "DDD".

Plaintiff's Exhibit "EEE".

Plaintiff's Exhibit "FFF".

Plaintiff's Exhibit "GGG".

Plaintiff's Exhibit "HHH".

Plaintiff's Exhibit "III".

Plaintiff's Exhibit "JJJ".

Plaintiff's Exhibit "KKK".

Plaintiff's Exhibit "LLL".

Plaintiff's Exhibit "MMM".

Plaintiff's Exhibit "NNN".

Plaintiff's Exhibit "OOO".

Plaintiff's Exhibit "PPP".

Plaintiff's Exhibit "QQQ".

Plaintiff's Exhibit "RRR".

Plaintiff's Exhibit "SSS".

Plaintiff's Exhibit "TTT".

Plaintiff's Exhibit "UUU".

Plaintiff's Exhibit "VVV".

Plaintiff's Exhibit "WWW".

Plaintiff's Exhibit "XXX".

Plaintiff's Exhibit "YYY".

Plaintiff's Exhibit "ZZZ".

Plaintiff's Exhibit "AAAA".

Plaintiff's Exhibit "BBBB".

Plaintiff's Exhibit "CCCC".

Plaintiff's Exhibit "DDDD".

Plaintiff's Exhibit "EEEE".

Plaintiff's Exhibit "FFFF".

Plaintiff's Exhibit "GGGG".

Plaintiff's Exhibit "HHHH".

Plaintiff's Exhibit "IIII".

Plaintiff's Exhibit "JJJJ".

Plaintiff's Exhibit "KKKK".

Plaintiff's Exhibit "LLLL".

Plaintiff's Exhibit "MMMM".

Plaintiff's Exhibit "NNNN".

Plaintiff's Exhibit "OOOO".

Plaintiff's Exhibit "PPPP".

Plaintiff's Exhibit "QQQQ".

Plaintiff's Exhibit "RRRR".

Plaintiff's Exhibit "SSSS".

Plaintiff's Exhibit "TTTT".

Plaintiff's Exhibit "UUUU".

Plaintiff's Exhibit "VVVV".

Plaintiff's Exhibit "WWWW".

Plaintiff's Exhibit "XXXX".

Plaintiff's Exhibit "YYYY".

Plaintiff's Exhibit "ZZZZ".

337 - 28613

FINDING OF FACTS.

We find that the requisition issued by the order of the fire marshal of the City of Chicago, February 27, 1923, referred to in the pleadings, was withdrawn by his authority on February 28th, the day after it was delivered to the civil service commission, and was so withdrawn before the said commission had acted thereon, pursuant to a discretionary power so to do vested in him by an ordinance of the city council of the City of Chicago.

(3450a)

29079

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

LUIS BRITO,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 620

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, Luis Brito, was charged with the statutory offense of encouraging Alice Strauss, a girl 17 years of age, to become a delinquent child, and that he did acts which directly contributed to conditions tending to render her such, the specified acts being that he enticed her from her parents' home and had sexual intercourse with her. A like charge was made at the same time against Julius Nolins of encouraging and contributing to the delinquency of Marie McNulty, a girl 16 years of age. They were tried together before the court without a jury, found guilty, and each was sentenced to the house of correction for one year, and fined. Because of the refusal of the court to vacate the judgment and grant a new trial this writ was sued out.

The trial was had on June 19, 1923. The next day Marie (or Mabel according to her correct name) became 16, and 30 days thereafter Alice Strauss became 18. The two girls left their homes a few days before June 11, when they began living at the same house. That day at the place they resided Mabel introduced Brito to Alice. For about a year prior to that time Mabel had been keeping company with Julius, or Julian, as he called himself, and attending dances with him. On the night

of June 11th they went to a cafe and danced until seven o'clock in the morning, when all went to the State of Indiana, where they were married at Valparaiso about one o'clock the next afternoon. They returned and lived together for five days at the house where the girls had been living, when about midnight a policeman walked in with the mother of Alice and arrested them.

The two girls were called as witnesses for the prosecution, but neither testified that there was any sexual intercourse between her and her husband prior to their marriage, or that their husbands enticed them from their homes. While they testified that the two young men gave them intoxicating liquor at the cafe on the night of June 11, and they became intoxicated, these facts were emphatically denied by the young men who told a story consistent with love and respect for the girls and a desire for legitimate relations. There is nothing to indicate any unwillingness or lack of consent by the girls to enter into marriage relations or that their marriage was not a legal one under the laws of the State of Indiana. The state's attorney in his brief assumes the marriages were legal, and states therein that as all the incriminating evidence was specifically denied by plaintiffs in error, and as each had been living apparently happy with his wife from his marriage up to the moment of arrest "the whole question here is whether or not the story of the boys, together with the undisputed circumstances that they married the girls and lived with them decently as husband and wife is sufficient to overcome the testimony of the girls against their husbands." From a review of the evidence we think this question must be answered in the affirmative. The young men were students, one from Cuba, the other from the

Philippines, attending the same school and same classes, but imprudent rather than criminal. Not only is the evidence of criminality very meager at best, but that which tends in any way to establish criminality is specifically denied by each of the young men whose standing is such as to entitle their testimony to as much weight as that given against them. Comment seems unnecessary, and we have no hesitancy in reversing the judgment upon this record.

REVERSED.

Gridley, P. J., and Fitch, J., concur.

(3451a)

✓ 29080

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JULINE MCLINE,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 620

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The facts in this case are fully stated in an opinion rendered this day in 29079, People of the State of Illinois v. Luis Brito, the two cases having been tried upon the same evidence. For the reasons therein stated, the judgment will be reversed.

REVERSED.

Gridley, P. J., and Fitch, J., concur.

Gridley, P. J., and Eaton, J., concur.

63 - 28333 (34520)

FRANK OSCHOTZ,
Appellee,

vs.

HAROLD J. COLEMAN et al.,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

2311.A.620

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant owner, Mrs. Emma Avery, from a decree which foreclosed a trust deed and dismissed a cross bill filed by her for want of equity. The cause was heard by the chancellor upon exceptions to a master's report. Certain of these exceptions, challenging the allowance of master's fees and solicitor's fees, were sustained by the court. The other exceptions were overruled. The decree, in conformity with the report, finds that there is due upon the principal indebtedness the sum of $460, and, in addition, interest thereon amounting to $73.13, making a total sum of $533.13. The decree allows for complainant's solicitor's fees the sum of $275, and allows to the master for stenographic fees $73.10 for taking and reporting the evidence $93.68, and as compensation for other services for which his fees are not fixed by law, $150, a total sum of $316.78.

The principal contentions of the appellants seem to be that solicitor's and master's fees are unreasonable, and that the finding of the decree on material points in controversy is contrary to the manifest weight of the evidence. It is said that the evidence shows complainant is not the owner of the trust deed foreclosed, but that the defendant, Harold J. Coleman, is the owner of the same. Upon the hearing complainant produced the note and trust deed and offered the same in evidence. The note was made to

the order of the maker, in this case Coleman, and by him endorsed. This proof cast upon Mrs. Avery the burden of showing that the complainant was not the owner, and we think she did not overcome the prima facie case thus made. The evidence shows that Mrs. Avery was the legal owner of the premises in question and that it had been agreed that the title to the same should be left in Coleman, and that he should negotiate a mortgage thereon, which he did on February 23, 1914, when he executed the principal note and trust deed in question. The Citizens Trust & Savings Bank was the owner of this note and trust deed at the maturity thereof, February 23, 1915. On that day the note and trust deed were delivered to Coleman uncancelled and the amount of the indebtedness was paid to the Citizens Trust & Savings Bank. On the same day it appears that the complainant Osmers executed an extension of the same for a period of two years, and he testifies that he paid the purchase price and that the note and trust deed were delivered to him, together with the extension coupons; that these remained in his possession thereafter. While the evidence on this point is not as clear and satisfactory as it might be, we are not able to say that the finding of the decree is against the manifest weight of the evidence in this respect.

Mrs. Avery's cross bill alleged that Coleman and others conspiring with the Aachen & Munich Fire Insurance Company had collected insurance money more than sufficient to satisfy the mortgage indebtedness. This company was made a defendant to the cross bill, but was afterward dismissed out of the case. The evidence shows that Mrs. Avery paid Coleman the premiums for fire insurance and that he procured a policy upon the building situated upon the premises in the Aachen & Munich Fire Insurance Company. It appears that there were two fires upon the premises and that in the last fire which occurred the building situated on it was wholly destroyed. After the first fire defendant Coleman col-

lected $30 on account of the loss sustained, $15 of which amount he applied on Mrs. Avery's indebtedness, and he admits that he now holds $15 of that amount which equitable belongs to her.

Abraham L. Harris, a brother of Mrs. Avery, who at one time claimed some interest in the premises and who acted as her agent in many of the dealings with Coleman, had procured a fire insurance policy written by the Continental Fire Insurance Company. After the building was burned, the uncontradicted evidence shows, that company paid to him $[illegible], being the full amount of the loss. The evidence also shows that Harris acted in this manner with Mrs. Avery's knowledge and consent. Coleman testifies to a request from Harris that he, Coleman, should assist in a scheme to collect insurance from both companies. Harris testified and his testimony is of a kind and quality that leaves us without doubt that Coleman's statement is correct. We therefore think that the Chancellor was justified in finding that this defense had not been sustained.

As to the further complaint in regard to solicitor's fees, we are inclined to think that the same are larger than should have been allowed in view of the small amount involved in this foreclosure. There is, however, much weight to the contention of the complainant that the manner in which the defense was conducted justifies the allowance of this amount. Much unnecessary testimony was taken, much unnecessary wrangling indulged in, and much matter wholly immaterial to any issue raised by the pleadings was brought out. But the facts were not complicated and the services required did not call for extraordinary professional skill. We think the sum of $150 a reasonable allowance for the services of complainant's solicitor.

The same observations which we have made as to the solicitor's fees are applicable to the fees allowed by the decree to the master in chancery. The allowance for stenographic fees and

for the taking and reporting of testimony is statutory and was proper. The master in his supplementary report states other services performed as follows: "I spent no less than ten days examining the pleadings and testimony, hearing arguments of counsel, preparing findings of fact and law and drawing report, and in my judgment a reasonable fee would be $200." The court allowed $150. From a careful examination of this record we are satisfied that the master either xxxxxxx worked much longer than was necessary or permitted counsel to talk much longer than was necessary. The issues in the case are simple, and while our examination of the record indicates that it must have been difficult indeed to restrain the arguments of counsel, we think the master had cast upon him a duty in that respect which he might not avoid. We find that the sum of $100 is a reasonable fee for services performed by the master other than those in which his compensation is fixed by the statute. The decree will, therefore, be modified by allowing to complainant for solicitor's fees the sum of $150 instead of $275, and by allowing to the master the sum of $100 instead of $150 for services other than those in which the fee is fixed by the statute.

The decree will be affirmed in part and reversed in part and all costs of this appeal will be taxed against appellant.

AFFIRMED IN PART AND

REVERSED IN PART.

McSurely and Johnston, JJ., concur.

84 - 28560

(3453)

In Re Estate of OTTO PERTSCH, Deceased,

Appellee,

vs.

REPUBLIC SECURITIES CORPORATION, a Corporation,

Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

231 I.A. 220

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the claimant from a judgment for costs entered upon the verdict of a jury finding the issues for the defendant estate.

The claim was based on a promissory note for the sum of $1800, dated May 29, 1914, payable six months after date with interest at the rate of 7 per cent per annum to the order of the Colonial Trust & Savings Bank and signed by Otto Pertsch, since deceased. The claim was first filed in the Probate court and upon hearing by the judge of that court was allowed in the sum of $2750. The estate appealed to the Circuit court, where a trial was had de novo. The defendant, therefore, under the usual practice, was not required to and did not file any written pleading stating its defense.

Upon the trial in the Circuit court the signature of the maker of the note was proved and the note introduced and received in evidence. A notation in lead pencil appears thereon as follows: "Sec. by 2000 Idaho Irr. bonds." The defendant states its contention to be that one Rose, who at the time the note was made was a director, stockholder and the president of the Colonial Trust Company and afterward the president of the plaintiff corporation, sold to the decedent Pertsch $2000 worth of the Idaho Irrigation bonds with the agreement that Pertsch might borrow

$1800 and pay for the bonds, and that when the note matured Ross would sell the bonds and give decedent the difference of $200. The bonds in question were produced in court and the evidence indicates that they are now worthless. In the absence of other witnesses it was apparently deemed necessary by the attorneys for the estate to make proof of this defense by calling Ross and one Fitzsimons, also a former officer and director of the Colonial Trust & Savings Bank and at the time of the trial an officer of the plaintiff corporation, as witnesses. The defendant says that while these witnesses were hostile, the evidence given by them on this issue was conflicting and that it was, therefore, for the jury to say whether the contention of the estate had been sustained. The attorney for the estate, however, does not point out to us evidence which would support this defense, and we have gone through the abstract without finding it.

The introduction of the uncancelled note with proof of the signature of the decedent thereto made a *prima facie* case for the plaintiff which was not overcome by any evidence produced in behalf of the defendant, and the court should have granted a new trial for the reason that the verdict of the jury was against the manifest preponderance of the evidence. We also think that the instructions given at the request of the estate were subject to criticism.

For the reasons indicated the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, J., and Johnston, J., concur.

(3454)

111 - 23387

JENNIE COOK GOSWEILER,
Appellant,

vs.

HERBERT VANHOFF GOSWEILER,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

231 I.A. 320

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The appellant, Jennie Cook Gosweiler, was the complainant and petitioner in the court below. On July 13, 1922, a decree for divorce was entered in her favor against Herbert Vanhoff Gosweiler. This decree found that the defendant had been guilty of extreme and repeated cruelty as charged in complainant's bill; found that he was in arrears in the payment of temporary alimony; awarded the custody of their one child to the complainant; and further ordered defendant to pay complainant the sum of $40 on the 2nd and 16th days of each and every month until the further order of the court as permanent alimony for her support and that of her child, the first payment to be made July 16, 1922. The record shows that this alimony has not been paid and that at numerous times thereafter the defendant upon petition of complainant was ordered to show cause why he should not be punished for contempt in neglecting and refusing to comply with the orders of the court. The defendant answered these petitions, in some cases under oath, and various orders of the court were entered thereon, which it is not necessary to describe in detail.

On November 24, 1924, complainant filed her petition setting up these prior proceedings, stating that on November 6, 1922, defendant being in court in person and by counsel, the

court found that there was due complainant $272.70; recites prior commitment of defendant and appeal from the order, stating that $230 over and above that amount has since accrued which the defendant willfully refuses to pay; prays that an order should be entered requiring him to show cause why he should not be punished for contempt.

On December 4, 1922, thereafter the defendant filed a petition setting up that the condition of the parties had changed since the entry of the decree and that it was impossible for him to comply with the order of the court. The petition states that complainant has secured employment and is earning $20 per week; sets up that defendant's only income is from his employment as a ticket seller, from which he receives $60.00 per month and certain tips; that since July 15th up to and including November 6, 1922, he had received only the sum of $37.80 for such tips. On the same day he filed an answer to petition of complainant attaching an account of moneys received and disbursed by him from November 6, 1922, to December 5, 1922; the accounts show total receipts amounting to $251.80 and expenses amounting to $127.37, leaving a balance on hand of $124.51. As in his petition, so in this answer he alleged that the condition of the parties had changed and prayed a reduction of the amount of alimony and solicitor's fees.

On December 5, 1922, the matter came on for hearing upon the affidavit of complainant and the sworn answer of the defendant and his petition to modify the decree. The court found that there was due to the complainant from the defendant alimony of $120 up to December 15, 1922; found that it was fair and equitable and just that the decree providing for the payment of $80 per month alimony should be modified, and entered an order by which it was so modified as to require that thereafter the defendant pay to the complainant the sum of $60 per month, pay-

able $30 on the 2nd and 16th days of each month. From the order thus entered this appeal is prosecuted by the complainant.

It is argued in her behalf that the court erred in modifying the final decree of July 13, 1922, without proof of a material change in the financial condition of defendant and in reducing the amount of alimony without proof or evidence to show that the financial condition of the defendant had materially changed.

There can be no question that a court has the power, on application, from time to time, to make such alterations in the allowance of alimony as shall appear reasonable and proper. Section 18 of the Divorce Act, vol. 2, Jones & Add. Statutes (1913) specifically so provides. But the contention of the complainant seems to be that the court could not properly do this without taking oral evidence showing the necessary facts.

The record in this case shows repeated rules entered and petitions and answers of both of the parties under oath giving in great detail the financial condition of the defendant. The allegation of the petition of defendant setting up that complainant had procured employment at $30 per week was not denied. We are not pointed to any place in the record where any request was made by any of the parties for leave to introduce further or other testimony. The matter seems to have been submitted to the court upon the facts thus appearing.

We think it was within the discretion of the court to modify the decree as to the amount which should be required to be paid, and this although the defendant was in contempt of court for failing to comply with its former orders. All this was within the discretion of the court, which will not be interfered with by this court unless it is clearly made to appear

that the discretion was abused. The leading case on this subject is Craig v. Craig, 163 Ill. 176, and it is needless to add anything to the law as there stated in order to decide this appeal.

For the reasons indicated the order of the trial court is affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

(3455)

136 - 28412

S. S. BORDSN COMPANY,
a corporation,
Appellee,

vs.

A. CHAPMAN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 321

MR. PRESIDING JUSTICE MANCHESTT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $187.30 entered upon the verdict of a jury, motion of defendant for a new trial having been overruled. The plaintiff has not appeared in this court. The defendant in support of the appeal urges that there was no evidence to support the verdict and that the case should have been taken from the jury for that reason. Further, that the verdict is contrary to the manifest weight of the evidence. The first point urged is not preserved in the record for the reason that there was no motion by the defendant for a directed verdict.

The statement of claim alleges that one M. D. Stein, doing business at 317 W. 69th street, in Chicago, was indebted to plaintiff in the sum of $187.30; that the defendant, Chapman, took over the business of said Stein and at the same time agreed in writing that he would pay the bills of creditors. The affidavit of merits denies the execution of any such writing and denies the making of any such promise.

The evidence tends to establish the fact that some time in February, 1929, Stein being indebted to plaintiff, as the statement of claim alleges, turned over the business then conducted by him, and in the course of the change the indebted-

ness here sued for was assumed by the defendant, Chapman. At that time a writing in nature of receipt was signed by the defendant which appears in evidence. It enumerates quite a number of articles and goods which the testimony tends to show is of the value of something like $3000. These different items are written in a column on the left side of the paper and fill this side of the sheet from top to bottom. A few items also appear on the upper right hand corner of the paper in the same handwriting, and in the remainder of the right hand column is written from left to right these words: "I hereby take the business of M.D. Stein and pay bills and creditors. Underneath this, written from left to right, appears the defendant's signature, "A.C. Chapman."

One Solomon, a brother-in-law of Stein, testified that he met the defendant about September 15, 1928, and that this was the only time he ever met him; that he was in a store at 317 E. 69th street. He says that the paper in question is in the handwriting of one Greenbaum, except the items showing certain merchandise, and that the remainder of the paper is in his own handwriting, and that he wrote the words in the right hand column binding the defendant to pay creditors. He said, "Mr. Chapman, you had better sign for the store," and Chapman answered, "All right," "and he signed it down here." He says defendant told him at that time that he was going to run the store and that at the request of defendant he gave him the key to the store, and took defendant to his home where he lived. He further testified on cross-examination that defendant did not write the paper and that he, the witness, did not know whether defendant could read but that he saw him sign his name.

It further appears from the evidence that Chapman did not pay anything for the business. Defendant testified that he could not read and write but could spell his name and write it. It appears that he is in the wholesale meat business at 3500

Wentworth avenue and is the sole owner of the business. He says that the two lines in the writing which required him to pay creditors were not in the paper. He is corroborated in this respect by a witness named Matukaetis, who describes himself as "employed by the U. S. Packing Company, which is the Chapman." This witness testified that he saw Mr. Chapman sign the paper and these these lines obligating him were not in it at that time. He produced a paper in his own handwriting which he says was a copy of the paper signed by defendant and this writing does not appear upon the copy. He also says that the defendant Chapman cannot "read and write."

Solomon on rebuttal testified that Matukaetis was not present when the paper was executed.

It is evident that the jury believed the evidence for the plaintiff because the jurors were convinced that a man would not give away $3,000 worth of property, leaving himself responsible for debts and obligations which had been incurred in the business. Further, the fact that the signature of the defendant appears written from left to right on the right hand side of the sheet and near the middle of it, indicates that the only reason it was there written was because the writing obligating defendant to pay creditors appeared directly above it. Otherwise the probable way would have been to sign at the bottom of the sheet and not on the side of it. Indeed, if defendant was not to undertake an obligation of some sort there would have been no necessity for his signing the paper at all. The jury and the judge who presided at the trial saw these witnesses, and therefore had an advantage which this court does not possess in weighing their evidence. We are not able to say that the verdict was against the manifest weight of the evidence and the judgment must therefore be affirmed.

AFFIRMED.

McMurray and Johnston, JJ., concur.

(34569)

146 - 28432

MARCUS BLUMENTHAL,
Appellee.

vs.

ALFONSO IMBOSSI,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

2311A 21

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant below from an order entered on the 9th day of December, 1922, denying his motion to vacate a default entered theretofore on the 20th day of October, 1922, and the judgment afterwards entered upon the finding of the court in the sum of $544.16 on the 16th day of November, 1922. The motion was based upon the record and was supported by certain affidavits.

The first contention of the defendant is that the court was without jurisdiction of the subject matter and that the judgment should have been set aside for that reason. The statement of claim shows that the action was in the nature of a tort. The allegations are, in substance, that the defendant was in possession of certain premises in the City of Chicago known as No. 723 South State street under a lease which expired by its own terms on May 1st, 1922, at which time plaintiff became entitled to possession; that the defendant unlawfully, without claim of right, wantonly and wilfully withheld possession of the premises from the plaintiff from said May 1st, 1922, up to and until the 30th day of June, 1922. The statement sets up special damages in that the plaintiff was said to have been for twenty-five years prior thereto engaged in the manufacture, sale and distribution of white duck goods products, for the then

last seven years at 724 South State street, and had acquired a large number of steady and regular customers so that the business was established and profitable; that by reason of the failure of defendant to surrender possession at the termination of his lease, plaintiff was compelled to disrupt, disorganize and discontinue the same until he had procured possession of the premises. A bill of particulars showing the different items of damage was attached to this statement of claim.

The Supreme Court of this state has expressly held against the contention of defendant as to the jurisdiction of the Municipal Court in this class of cases where the damages claimed do not exceed $1,000 in Meisn v. Met. Amusement Assn., 241 Ill. 177. The defendant says this case is mere dictum, for certain reasons which he argues at length. That argument, if it is to be availing, must be presented to the Supreme Court.

The defendant next contends that the court upon overruling his plea to the jurisdiction should have set the cause down for trial, and makes a point which is not quite clear that the court in some way lost jurisdiction. A case cited in support of this contention, Grubb v. Lilan, 249 Ill. 456, indicates that defendant has confused the rule that the Municipal Court loses jurisdiction of a judgment/thirty days thereafter with its jurisdiction over the case rendered prior to the judgment. There is no merit to this contention.

Again, the defendant argues that the court erred in entering an order defaulting him. He terms this an "automatic default," whatever that may mean. However, as defendant entered no general appearance and paid no appearance fee until long after the default and judgment were entered, he clearly was in default, not only under the rules of the Municipal Court but by virtue of section 43 of the Municipal Court Statute.

Whether a motion to set aside a judgment of this kind should be allowed is a matter resting in the sound discretion of the court. Two conditions precedent must be made to appear: First, that the defendant was not negligent in the matter of presenting his defense; and secondly, that he has a good defense to plaintiff's claim upon the merits. If he does not have a good defense, obviously there would be no reason why the judgment entered should be set aside. The appeal from an order denying a motion of this sort does not bring up the whole record for review, as defendant seems to think, but only the particular order from which the appeal is taken. It is unnecessary to cite numerous cases to sustain these statements but see Kitsche v. City of Chicago, 380 Ill. 268, and Hartford Life Ins. Co. v. Bassiter, 196 Ill. 377. An examination of the affidavits submitted in support of the motion shows that defendant was negligent and careless in the matter of presenting his defense. In fact the affidavits, both of which are by the attorney for the defendant, are in some respects directly contradictory, since in the one affidavit he says that he is "familiar with the facts," while in the other he attempts to excuse himself from proper attention to the case by asserting that he did not, at least in the beginning, have knowledge of the facts and was not the attorney for the defendant. It is not argued in the brief that the affidavit of merits presented a meritorious defense.

The judgment of the trial court must be affirmed.

AFFIRMED.

McCurdy and Johnston, JJ., concur.

155 - 28431

(3457)

ATLAS COPPER & BRASS MANUFACTURING CO., a Corporation,
Appellee,

vs.

J. O. [illegible] used as J. O. [illegible],
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I.A. 321

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in favor of the plaintiff in the sum of $77.38 entered upon the finding of the court.

The plaintiff's statement of claim shows a demand for goods, wares and merchandise sold and delivered and for labor and material furnished at the instance of defendant. The subject matter of the controversy is a copper coil manufactured by the plaintiff for defendant at his request. The affidavit of merits set up as a defense that the copper coil was wholly useless for the purpose for which it was ordered and intended.

The president of the plaintiff company testified in substance that defendant came to the office of plaintiff and said that he wanted a copper coil made and put into a tin box, which he brought with him, and which was to be used as an attachment to automobiles; that the witness told defendant that plaintiff would make it of three-quarter inch tubing, but it would be very difficult to do so on account of the short bends; that if one-half inch tubing could be used very fine bends could be made, and showed defendant a sample. Defendant said he was not a mechanic but would leave it to his mechanic, who would be in the following morning, and advise how to make it, and whatever he, the mechanic, said would be O. K.; that the next day a man came in who said he was the mechanic and advised the witness how to make the coil, and that he

made it as instructed; that the material and labor which went into the machine cost $27.65; that when the machine was completed it was delivered to the mechanic, who brought it back; that the inlet and outlet connections were changed and it was delivered to the same man who gave the directions; that thirty or sixty days afterwards the witness 'phoned defendant, when he, defendant, stated that the coil was not made right and told witness that if he would come to his, defendant's, office he would show it to him; that the witness dropped in to defendant's office about two hours later and asked to see the coil; that defendant stated it was in a desk at the place where he had just moved from and that he did not have the keys, and that witness would have to call again; that after talking for about an hour defendant said he was hard pressed for money, but would send a check within a couple of weeks; that not hearing from him a month later the witness again called him up and asked him to pay the bill, which he refused to do, saying that a pattern-maker had advised him that the coil was not made right.

The defendant testified that plaintiff's president promised that he would make the machine and use three-quarter inch pipe; that when the machine came back it was so defective in construction that it would not answer the purpose for which it had been ordered; that he called plaintiff on the 'phone the same day and told him that he could not use it and would not accept it, but that if he would make some changes he would accept it; that the president of plaintiff's company replied that he had done the best he could and would not change it, and defendant would have to take it as it was, and that was all that was to it.

The copper coil was intended by the defendant to hold a vaporized mixture of gasoline and air, his theory being that when this mixture was brought in contact with the heat in the tin box

it would gasify into a perfect dry gas. He says that a liquid mixture occupies certain cubic inches for a certain volume which when changed into a dry gas occupies a greater space. Defendant testified further that he stated to plaintiff's president that he needed certain volumetric efficiency in order to compensate for the rarification of the gas, and that he positively could not use a pipe having less space than three-quarters of an inch diameter, and that he doubted very much whether he could obtain sufficient efficiency with that size pipe, but would risk it. He says he did not try the machine to see if it would work because he knew it would not on account of the smallness of the pipe and defective construction. The device itself has been introduced in evidence and certified to this court as an exhibit.

The testimony of the witness for plaintiff that the defendant said to him that he, defendant, was not a mechanic but would leave the matter to his mechanic, who would be in the following morning to advise plaintiff how to make it, and that what this employee said would be O. K., is not specifically denied by the defendant. He says that he did not send his machinist to give instructions, that he only sent a man employed by him as a messenger to bring away the machine. This messenger, however, is neither produced nor accounted for.

The manufactured device remained in the possession of the defendant and was by him produced at the trial. If it was made according to instructions, as the plaintiff testifies, then alleged defects in it are immaterial. The court had the opportunity of seeing the witnesses, and we think this court may not say that the finding of the trial Judge is clearly against the manifest weight of the testimony.

The judgment must be affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

164 - 28440

A. C. FLYNN HEATING COMPANY, a corporation,
Appellant,
vs.
DELIA HOEY,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I. A. 321

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered in favor of the defendant upon the verdict of a jury, motion for a new trial having been overruled. The only error assigned and argued is that the verdict was manifestly against the weight of the evidence.

The statement of claim alleges and the proof tends to show that on April 26, 1930, plaintiff entered into a written contract with the defendant whereby plaintiff agreed to install a No. 58 Thatcher Tubular Furnace complete with 14 floor registers and 12 face registers opening to various rooms. A fan was to be installed in the cold air casing at the bottom of the furnace so as to distribute the heated air to the various rooms. The contract further provided: "This work is to be done with competent mechanics and is guaranteed to heat the building to 70 degrees in the coldest winter weather, when properly fired." The designing and installation of the heating plant seems to have been entrusted by the plaintiff to one Bloomer, who quit the job before it was completed.

The price of the furnace installed was $950, of which amount the defendant at different times prior to the beginning of this suit had paid $450. At the beginning of the suit she filed a claim of off-set for that amount, which the record

indicates was withdrawn.

The defense set up is that the furnace would not and did not at any time heat the premises to 70 degrees, either in cold or mild weather. The plaintiff contends that the failure of the furnace to heat the house was not due to any defect in the installation of the same but because of the lack of intelligent operation of it. Defendant on the other hand claims that the installation was defective. It is admitted that as a general rule furnaces are installed in a basement and as near to the center of the building to be heated as is possible. There was no basement to the defendant's house and Bloomer says: "We had to build a house in the backyard * * * I installed the furnace under the porch. We built a house separate for that furnace. We run ducts to the ceiling and had them go to each room. I had to cut into each room and make registers to allow the heat to come through; and downstairs we had to put in a 30-inch fan to force the heat down. The fan is operated by electricity. It is attached to the bottom of the furnace, and forces the hot air upwards in the ducts leading into the rooms. * * * When you force the heat down from the ceiling, you have to use a fan." The defendant says that one told him that she would dig out the basement but that Bloomer told her that he had a new invention for heating that was not well known around Chicago; that hers was the first.

A witness for defendant, who qualified as an expert in the heating and ventilating business, testified that he had inspected the plant; that the heating plant was placed in a shed by itself outside of the main building, thereby getting no heat from the radiation in the building; that the building was 66 feet long by 22 feet wide outside - 20 feet on the inside, making about 14,500 cubic feet on the first floor and 13,000 cubic feet on the second floor. He stated that the building could not be heated

by the furnace as installed; that a day was set for a test, after plaintiff had made some changes; that the witness was there at that time but that the contractor and his assistant had left a few minutes before he got there; that he made the test and placed a thermometer in the front room on the first floor and started a good fire; that it was 36 degrees on the outside and 58 degrees on the inside, with the fan running all the time; that the upstairs was quite warm close to the heater but at the farther end there was no heat.

The jury has found the issue of fact against the plaintiff and we are inclined to think that its finding is justified by the evidence. The judgment is therefore affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

179 - 28455

(3451)

ANGELOS PAPPAS,
Appellee,

vs.

R. L. LANGFORD,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

231 I.A. 121

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $657, entered upon the finding of the court. The claim of plaintiff was for damages sustained by an automobile of which he was the owner in a collision with the automobile of defendant. The statement of claim alleged that a servant of plaintiff, who at the time in question was driving plaintiff's automobile, was in the exercise of due care and that the collision occurred as a result of the negligence of the defendant in the operation of his car. The affidavit of merits denied that plaintiff's servant was in the exercise of due care and denied the negligence alleged against the defendant.

The accident in question occurred at about two o'clock a. m., on the morning of February 26, 1928, at the intersection of Dorchester avenue and 57th street in the city of Chicago. Dorchester avenue is a public highway extending north and south and 57th street is a public highway extending east and west. It is agreed that Dorchester avenue from curb to curb is 28 feet and 7 inches in width at the intersection in question, while 57th street at the same place likewise measured is 34 feet and 7 inches wide. The automobile of plaintiff was a Dodge taxicab weighing about 3200 pounds. The defendant was driving a Lincoln touring car weighing 4800 pounds. Plaintiff's car was proceeding south on Dorchester avenue and approached the inter-

section from that direction. Defendant's car was moving eastward along 57th street. The uncontradicted evidence also tends to show that after the collision both of the cars were headed south, plaintiff's car landing upon the curb on the southeast corner, while defendant's car was in Dorchester avenue facing south. The evidence also shows that the streets at this time and place were covered with frost.

Pictures of plaintiff's car as it appeared immediately after the accident were received in evidence. These show that the right front wheel was broken off; that the running board was broken off and the frame bent in against the engine on the right side; the glass in the body broken and the body of the car wrenched almost apart from the rear of the driver's seat, besides other injuries. As to the precise manner in which the injury occurred, there is a sharp conflict in the evidence. The sole and only witness for the plaintiff was his brother, Spiros Pappas, who was the driver of the taxicab, and who at the time he gave his testimony had a suit of his own pending against the defendant for personal injuries alleged to have been sustained at that time. His testimony is to the effect that he was driving on the west or right hand side of Dorchester avenue at between 15 and 18 miles an hour; that as he approached the intersection of 57th street he slackened his speed to about 10 to 12 miles an hour; that just as he got near 57th street he saw defendant's car coming east on 57th street; that when he first noticed defendant's car it was about 40 feet away; that before he, the witness, got to the middle of the street the front end of the defendant's car hit the right side of the car he was driving; that he thereupon became unconscious and when he awoke he was in the Illinois Central hospital. He says that while driving between 56th and 57th streets he did not see anything ahead of him on the street; that there was no other vehicle ahead of him; that he saw

no vehicles either standing or running ahead of him, and in particular that he did not see the Yellow cab standing in the street ahead of him. He says that he was driving on the right side of the street and about 5 feet from the curb, and that he drove straight along that way until he crossed out into the intersection; that he was about 5 feet from the west curb all the time; "As soon as I got to the intersection I seen Langford's car coming and I tried to swing east to avoid the accident. I stayed within 5 feet of the curb until I got out into the intersection. I was about 10 feet north of the north curb of 57th street when I first saw Mr. Langford's car. His car was then 40 feet away." As to the precise manner of the accident the testimony of this witness is somewhat contradictory. He says, "I didn't turn at all until I got struck. I didn't turn, I got hit and that is the time I have swung east." He also says, "When I reached the curb line on the north side of 57th street I swung east to avoid the accident."

This testimony of the witness as to the manner in which the accident occurred is contradicted by the defendant, and also in particular by one Frater, who at the time he gave his testimony was a timekeeper for the Chicago Steamship Lines and who appears to be a disinterested witness. He says that at the time in question he was driving a Yellow cab and was driving south on Dorchester avenue at about 57th street; that when he came to the corner he noticed headlights coming and slowed down; that the cab of plaintiff passed him on the left. He says that he, the witness, came to a stop about 15 or 20 feet from the corner, referring to the curb line; that he was right in close against the west curb and that plaintiff's taxi passed him about 6 or 7 feet, maybe more; that at the time plaintiff's car passed him the eastbound automobile was about 30 feet from the corner, and that the taxi passing him was quite a bit to the left side of Dorchester; that the collision occurred in the center of 57th street and Dorchester avenue; that

the left front end of the touring car and the right front end of the taxi came together at right angles; that the eastbound automobile was on the right side of 57th street, the left side of defendant's car being about in the center of the street.

The defendant testified that he did not see the plaintiff's car until it was within 15 feet of him; that as he neared the intersection he saw a Yellow cab coming from the north; that he put on the brakes and started to slow up; that he came to a stop and started to go straight on again, but just as he started the plaintiff's car came around from the east side of the Yellow cab and that both came together right in the center of the street. He says that prior to the collision he was driving on the south side of 57th street and that the north left front wheel of his car was about in the center of the street; that plaintiff's car was running on the east side of the street; that the Yellow cab was standing about five feet away from the west curb of Dorchester avenue.

It thus appears that the somewhat contradictory evidence of plaintiff's witness, who was interested not only by reason of the fact that he was the brother of plaintiff, but also interested in a financial way by reason of his own suit growing out of the same transaction, is contradicted by the defendant and also by a disinterested witness, who, we are satisfied from the manner in which he testified, was present at the whole occurrence, although his presence at the time in question is denied by the witness for plaintiff. We have not in this respect overlooked the testimony of a policeman, who claimed that some time after the occurrence on the particular morning he examined the tracks made on the frosty street by defendant's automobile and concluded therefrom that the defendant was driving not on the south but rather to the north of the center of 57th street. His evidence, which merely stated his conclusion, has, however, little weight.

The physical condition of the respective cars as

testified to and their location immediately after the accident, which is not disputed, leads us to the conclusion that the clear preponderance and weight of the evidence tends to sustain the contention of defendant that plaintiff's driver approached the intersection on the left side of Dorchester avenue, and that under the circumstances by virtue of the statute as interpreted in Partridge v. Ehrstein, 225 Ill. App. 208, the defendant was entitled to the right of way, that plaintiff's driver negligently and in violation of the statute failed to give it to him, and that in this way the negligence of plaintiff's driver rather than that of the defendant was the real cause of the accident.

Being of the opinion that under all the evidence, and by a clear and overwhelming weight of it, the plaintiff was guilty of contributory negligence proximately tending to bring about the accident in question, it follows that the plaintiff cannot recover. We are also of the opinion that under the rule laid down in Donelson v. Lake St. Louis Ry. Co., 236 Ill., 625, and Engel v. Chicago City Ry. Co., 216 Ill. App., 11, the judgment should be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

McSurely and Johnston, JJ., concur.

FINDING OF FACT.

The court finds as a fact that the driver of the car which sustained damages in the accident here in question was guilty of contributory negligence at the time of the accident proximately causing the same.

180 - 28456

SPIROS PAPPAS,
Appellee,

vs.

R. L. LANGFORD,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment rendered upon a trial before the court upon a claim for damages for personal injury. The plaintiff, who is appellee, was the driver of a taxicab owned by his brother, Angelos Pappas, and this car collided with an automobile owned and driven by the defendant, R. L. Langford, the collision occurring on February 26, 1922, at the intersection of Dorchester avenue and 57th street in the City of Chicago, County of Cook, Illinois. The facts in regard to that accident are set forth in an opinion this day filed in case No. 28456, entitled Angelos Pappas, appellee, v. R. L. Langford, appellant. The conclusion there reached upon a review of all the testimony was that by clear and overwhelming preponderance it showed that the driver of the car, who is the plaintiff here, was guilty of contributory negligence proximately tending to bring about the collision which occurred. For the reasons there set forth upon review of the evidence, which it is unnecessary to repeat here, the judgment must be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

McSurely and Johnston, JJ., concur.

180 - 28456

FINDING OF FACT.

The court finds as a fact that the plaintiff in this case, Spiros Pappas, was at the time of receiving the injuries for which he sues, guilty of contributory negligence proximately causing the accident in question.

207 - 28485

HENNY BLACK,
Appellee,

vs.

LOUIS HYMEN and CHARLES HYMEN, Doing Business as Hymen Bros.,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

231 I.A. 322

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a judgment in the sum of $1575, entered upon the verdict of a jury, motions for a new trial and in arrest of judgment having been overruled. Two points are argued by the defendants: First, it is said that the verdict is against the manifest weight of the evidence; and second, that the verdict should have been set aside on account of improper intermeddling with the jurors.

Uncontradicted evidence was introduced tending to show that on November 24, 1930, plaintiff, who was a designer of ladies' dresses, entered into a written contract, under seal, with the defendants in and by which they employed him in the capacity of a designer for a term of one year commencing November 20, 1930, for a compensation of $100 a week and a bonus of $500; that plaintiff commenced his services on November 29, 1930, and was discharged by written notice dated December 10, 1930, which notice stated in substance that plaintiff had obtained the contract by false and fraudulent pretense and that defendants declared it null and void. The notice also demanded the return of the $500 bonus which had theretofore been paid by defendants to plaintiff. Although the written contract provided that failure of the patterns or designs created by the employee to sell, or dissatisfaction of the employers with the same would not be deemed cause for discharge, the defendants introduced evidence tending to show that plaintiff was incompetent in

this respect; further, that he had made representations prior to the entering into the written contract to the effect that he had New York connections through whom he could get styles to copy, and that he could create between 30 to 40 new designs within twenty days, and that these representations were untrue. The making of any such representations was positively denied by the plaintiff, and in view of inconsistencies which appeared in the testimony of the defendants it is obviously impossible for this court to say that the evidence on that point preponderates in favor of the defendants. So likewise with respect to the evidence submitted to the jury in regard to plaintiff's competency. It appears that he was working for another employer just prior to entering into the contract with the defendants, and that immediately after his discharge by defendants he returned to that employment. The jury who tried the case were in a much better position to pass on this evidence than is this court, and we cannot, under well established rules, hold that the verdict of the jury is manifestly and clearly wrong.

The charge as to intermeddling with the jury we have carefully examined, and think it is wholly without merit. One Gittelsmam represented to the court that during a recess of the court he had occasion to go to the toilet room in the court building, where he saw an assistant to plaintiff's attorney talking to four or five of the jurymen about the case, and that he heard the assistant say to these jurors, "Why, you can see this is a frame up." The remark is denied by the assistant, Kelley, and every juryman trying the case was called by the trial Judge after its conclusion, and they stated that no such remark had been made in the hearing of any of them. We are satisfied that the charge was the result of a lively imagination.

No reason appearing for its reversal, the judgment is affirmed.

AFFIRMED.

McDurely and Johnston, JJ., concur.

219 - 28495

HERMAN J. BERGHOFF,
Appellee,

vs.

WALTER B. ANDERSON and WILLIAM H. TERRELL, doing business as Anderson & Terrell,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 222

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants in the trial court from a judgment for the possession of certain premises entered by the court upon the verdict of a jury, motions for a new trial and in arrest of judgment having been overruled.

The evidence tends to show that defendants were in possession of the premises in question under the terms of a written lease; that a five-day notice was served on them by plaintiff demanding unpaid rent in the sum of $999. The lease provides that at the time of its acceptance and execution defendants should deposit with plaintiff the sum of $400 as security for the performance of the covenants of the lease, this sum to be applied upon the rents for the last months of the tenancy. It is argued here that this $400 with interest should have been credited upon the amount of rent claimed to be due at the time the notice was served, and that the demand was, therefore, for an improper sum. The defendants, however, in the trial court offered no evidence tending to show that this $400 had ever in fact been deposited. There was an allegation in an affidavit theretofore filed in the cause in support of a motion of defendants to set aside a default judgment to the effect that this

$400 had been deposited, and this affidavit was offered in evidence by the plaintiff as a declaration against interest on another point arising in the case. The contention not having been raised by defendants in the lower court it would seem they ought not to be permitted to urge it here. Moreover, it is difficult to see how a determination could be had as to the rights of the parties in respect to this $400 before defendants had been dispossessed. There is no evidence before this court from which it can be determined that there is any credits due defendants on this account and the point is, therefore, not well taken.

The defendants further argue that the court erred in striking out and instructing the jury to disregard certain evidence which it is claimed tended to show a subsequent oral agreement between the plaintiff and defendants by which the defendants should make certain repairs and improvements on the premises, the value thereof to be credited upon the rent which might accrue. There was testimony tending to show that certain conversations in this respect took place between certain of the defendants and Mr. Shipp, who it appears was employed as agent for plaintiff for the collection of the rent. There was no evidence from which the jury could reasonably find that Mr. Shipp had any authority to change the provisions of the lease which required that the lessees should make the necessary repairs. As there was no foundation laid for the introduction of the testimony in question, the court did not err in striking it out.

It is claimed that there was no evidence that defendants were in possession of the premises. We think there was sufficient evidence to make a prima facie showing on that point.

The judgment is therefore affirmed.

AFFIRMED.

McBurely and Johnston, JJ., concurs

228 - 28D04

(3463)

IRA J. WEBSTER CO., Inc.,
Appellant,

vs.

T. BRAUDE and J. BRAUDE,
Copartners trading as
OVERLAND SHOE CO.,
Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff corporation from a judgment entered in favor of the defendants, a co-partnership, upon the verdict of a jury.

Statement of claim discloses that the suit was for the purchase price of certain cases of shoes which defendants, who were jobbers, had ordered from the plaintiff manufacturer, and which defendants upon delivery rejected as not being of the kind or quality of the sample from which the order was given. This issue of fact was submitted to the jury and its finding was as above indicated.

It is argued in behalf of plaintiff that the court erred in receiving improper evidence offered by the defendants and in rejecting proper evidence offered by the plaintiff, and in the giving and refusing of instructions. Further, that the judgment is against the law and the evidence. We regret to find upon an examination of the record that none of these questions can be considered by this court, for the reason that the bill of exceptions fails to show that a motion for a new trial was made by plaintiff. An order overruling such a motion appears in the record as made up by the clerk, but it is not preserved in the bill of exceptions, and in the very recent case of Drummond v. Hess, 328 Ill., 488,

Cia. v. Stevens, Inc.,
Appellant,
v.
C. Stevens and I. Stevens,
Corporate Surety to
Respondents.

the Supreme Court has expressly held:

> "In the absence of a bill of exceptions or certificate of evidence in such cases in chancery, or of a stenographic report signed by the trial Judge and made a part of the record and containing the motion for a new trial, and the instructions of the court refused and given, no question can arise in a court of review on the sufficiency of the evidence to support the verdict or on error assigned for the giving or refusing of instructions."

Other cases supporting the rule as above announced are Johnson v. Farrell, 215 Ill., 542; Tucker v. Cole, 140 Ill., 150; East St. Louis N. R. Co. v. Cauley, 148 Ill., 490; Firemen's Ins. Co. v. Pack, 196 Ill., 493; Baldwin Co. v. Harnell, 113 Ill. App., 599; and Hayes Pump & Planter Co. v. Vickers, 187 Ill. App. 94. While bound by the rule as announced in these cases, we have, notwithstanding, considered the points made and argued and are of the opinion that even if the rule did not preclude our consideration of them the judgment nevertheless ought to be affirmed.

AFFIRMED.

McSurely and Johnston, JJ., concur.

243 - 28519

ABE OSTROVSKY,
Appellee,

vs.

ASHER ROSENBERG,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

231 I.A. 323

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment entered upon the finding of the court in favor of the plaintiff in an action of forcible detainer.

The first contention of the defendant is that the notice to terminate his tenancy was insufficient. There was testimony for the plaintiff tending to show that a sixty day notice was served on the defendant by leaving it with a young lady in the store, who "said she was Mr. Rosenberg's daughter," and who "was in charge of the place." This was on the 14th day of October.

The evidence further tended to show that the defendant in another suit between the same parties with reference to these same premises, had admitted that he received this notice, and further that after the service of it, namely on October 16th, defendant called up plaintiff's agent on the phone and asked what he wanted "with that notice." The agent testified that the young lady in charge at the time this notice was served gave the name of Edna Rosenberg. However, the sister of Edna, one Sarah, testified that she was the young lady in charge of the store at the time in question and that she was never served with the notice. Edna Rosenberg did not testify.

The court had the advantage of seeing and hearing

the different witnesses and we do not think that on this evidence we would be justified in setting the finding of the court aside.

The defendant, however, further contends that the leasing of these premises was not verbal and that he held under a written lease, by the terms of which the notice given was insufficient. If this was true the lease should have been produced by him or a showing made with reference to it. Osgood v. Groseclose, 159 Ill. 511.

The judgment is affirmed.

AFFIRMED.

McCurely and Johnston, JJ., concur.

7186

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I. A. 123

BE IT REMEMBERED, that afterwards, to-wit: On AUG 1 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

People of the State of Illinois,
defendant in error,
vs.
Clarence Finefield,
plaintiff in error,

Error to the Circuit Court
of Livingston County.

Partlow, P.J.

231 I.A. 323

The plaintiff in error, Clarence Finefield, was found guilty in the circuit court of Livingston county under the sixth count of an indictment charging a violation of the Prohibition Act and to review the judgment entered against him a writ of error has been prosecuted from this court.

One of the assignments of error is that the sixth count of the indictment violates the rule as to duplicity. This assignment of error is not argued by plaintiff in error in his brief and therefore is waived. Wabash St. Louis & Pacific R.R. Co. v. McDougal, 113 Ill. 603; Keys v. Kimmell, 186 Ill. 109; Duffy v. Leavitt, 81 Ill. App. 410. Even if this error was not waived, it was not raised in the trial court. If plaintiff in error desired to question the sufficiency of the indictment in this respect he should have made a motion to quash the indictment, or made a motion in arrest of judgment. Neither of these motions was made. If he saw fit to go to trial upon an indictment containing counts which were in violation of the rule against duplicity he had the right to do so and cannot now complain of that fact.

It is contended that the verdict is not sustained by the evidence. The evidence on behalf of the People shows that the sheriff of Livingston County employed C. H. Ledderboge and Clifford Walters to investigate the illegal sale of intoxicating liquor in the village of Odell. At Barrow's pool hall and Schultz's dry cleaning establishment, Ledderboge and Walters learned they could probably get intoxicating liquor from the plaintiff in error and Walters asked plaintiff in error for some whiskey. Plaintiff in error

People of the State of Illinois,

defendant in error,

vs.

Clarence Minefield,

plaintiff in error.

Error to the Circuit Court of Livingston County.

Martin, J.

The plaintiff in error, Clarence Minefield, was found guilty in the circuit court of Livingston county under the sixth count of an indictment charging a violation of the Prohibitory Law to review the judgment entered against him a writ of error has been prosecuted from this court.

One of the assignments of error is that the sixth count of the indictment violates the rule as to duplicity. This assignment of error is not argued by plaintiff in error in his brief and therefore is waived. Wabash St. Louis & Pacific R.... Co. v. Jackonyal, 113 Ill. 603; Keye v. Kimmell, 186 Ill. 109; Duffy v. Leavitt, 81 Ill. App. 410. Even if this error was not waived, it was not raised in the trial court. If plaintiff in error desired to question the sufficiency of the indictment in this respect he should have made a motion to quash the indictment, or made a motion in arrest of judgment. Neither of these motions was made. If he saw fit to go to trial upon an indictment containing counts which were in violation of the rule against duplicity he had the right to do so and cannot now complain of that fact.

It is contended that the verdict is not sustained by the evidence. The evidence on behalf of the people shows that the sheriff of Livingston County employed C. H. Ledgerbogo and Clifford Walters to investigate the illegal sale of intoxicating liquor in the village of Odell. At Darrow's pool hall and Schultz's dry cleaning establishment, Ledgerbogo and Walters learned they could probably get intoxicating liquor from the plaintiff in error and Walters asked plaintiff in error for some whiskey. Plaintiff in error

agreed to meet them that night, which was September30, 1922, about eight o'clock. They met as agreed and the three of them went in an automobile to the home of the plaintiff in error which was about three quarters of a mile from the pool hall and outside the village limits. When they reached the house, Walters gave the plaintiff in error $3.00 and the plaintiff in error went into the house and returned with a quart of whiskey which he delivered to Walters. In his defense, plaintiff in error denies all of these transactions and says that he met these men only once and did not meet them on the occasion in question; that on the evening in question he was at home from 6 o'clock until 8:30 and then he and his sister went in his car to the village. His father and sister testified that plaintiff in error was at home from 6 to 8:30 on that evening and his sister testified to her trip to the village with him. The contention of the plaintiff in error is that the evidence on behalf of the People consisted of the testimony of two hired witnesses who testified to the alleged illegal sale, while the plaintiff in error produced three witnesses who testified to an alibi, and for this reason the proof did not establish the guilt beyond a reasonable doubt, therefore the verdict was contrary to the evidence. This was a case in which it was the province of the jury to determine the weight of the evidence. People v. Nylin, 236 Ill. 28. If the jury believed the evidence on behalf of the People established the guilt of the plaintiff in error beyond a reasonable doubt, it was the duty of the jury to find the plaintiff in error guilty. If they believed the evidence on behalf of the plaintiff in error, the jury should have found him not guilty. Where there is merely a conflict in the evidence, the verdict will be affirmed. Duffy v. People, 98 Ill. App. 54; People v. Eastman, 93 Ill. 112. A verdict will not be reversed unless it appears that it is not sustained by the evidence beyond a reasonable doubt. Steffy v. People, 130 Ill. 98; McCoy v. People, 175 Ill. 224. We cannot say the evidence does not establish the guilt of the plaintiff in error beyond a reasonable doubt and we do not feel justified in setting aside the verdict on account of

do not feel justified in setting aside the verdict on account of the plaintiff in error beyond a reasonable doubt and we guilt of the plaintiff in error beyond a reasonable doubt and we 179 Ill. 224. We cannot say the evidence does not establish the a reasonable doubt. Beatty v. People, 180 Ill. 98; McCoy v. People, unless it appears that it is not sustained by the evidence beyond the verdict will be affirmed. Duffy v. People, 98 Ill. App. 94; People v. Beetham, 93 Ill. 112. A verdict will not be reversed

not guilty. Where there is merely a conflict in the evidence, heif of the plaintiff in error, the jury should have found him plaintiff in error guilty. If they believed the evidence on be- yond a reasonable doubt, it was the duty of the jury to find the of the People established the guilt of the plaintiff in error be- Mylin, 236 Ill. 28. If the jury believed the evidence on behalf the jury to determine the weight of the evidence. People v. the evidence. This was a case in which it was the province of beyond a reasonable doubt, therefore the verdict was contrary to plaintiff, and for this reason the proof did not establish the guilt plaintiff in error produced three witnesses who testified to an witnesses who testified to the alleged illegal sale, while the on behalf of the People consisted of the testimony of two hired him. The contention of the plaintiff in error is that the evidence evening and his sister testified to her trip to the village with that plaintiff in error was at home from 6 to 8:30 on that went in his car to the village. His father and sister testified at home from 6 o'clock until 8:30 and then he and his sister the occasion in question; that on the evening in question he was and says that he met these men only once and did not meet them on In his defense, plaintiff in error denies all of these transactions returned with a quart of whiskey which he delivered to Walters. in error $2.00 and the plaintiff in error went into the house and limits. When they reached the house, Walters gave the plaintiff three quarters of a mile from the pool hall and outside the village an automobile to the home of the plaintiff in error which was about eight o'clock. They met as agreed and the three of them went in agreed to meet them that night, which was September 15, 1922, about

insufficient evidence to sustain it.

In support of the motion for a new trial the plaintiff in error filed affidavits showing newly discovered evidence, namely, that Ledderboge was in Barrow's pool hall from 6 o'clock to 11 o'clock on the evening in question. One affidavit was filed by Barrow and the other by Chas. H. Millwood. In order to justify a new trial on the ground of newly discovered evidence it must appear that the evidence will probably change the result if the new trial is granted. The evidence must have been discovered since the trial and the affidavits must show that it could not have been discovered before the trial by the exercise of due diligence. It must be material to the issue. It must not be merely cumulative or in the nature of impeaching evidence. People v. Williams, 242 Ill. 197. In People v. Johnson, 238 Ill. 52, on page 60, it was said; "Applications for a new trial on the ground of newly discovered evidence are not looked upon with favor by the courts, and, in order to prevent, as far as possible, fraud and imposition which the defeated parties might be tempted to practice as a last resort to escape the consequences of an adverse verdict, such application will be subject to the closest scrutiny by the court, and the burden will be upon the applicant to rebut the presumption that the verdict is correct and that there was no lack of due diligence." The indictment was returned in October, 1922, The trial was on December 12, 1922. The name of Millwood was on the back of the indictment as a witness for the People. Plaintiff in error had knowledge of this fact and if he desired to do so he could have talked to the witness and ascertained what he knew about the case and this would probably have resulted in the discovery of the evidence set out in the affidavit. Millwood was apparently not a hostile witness to the plaintiff in error. Barrow's pool room was mentioned in the case almost from the beginning. It is apparent that the exercise of due diligence by the plaintiff in error would have discovered the evidence in ample time to have secured it on the trial. From the facts presented we think the trial court was justified in overruling

insufficient evidence to sustain it.

In support of the motion for a new trial the plaintiff in error filed affidavits showing newly discovered evidence, namely, that Loddenbogo was in Barrow's pool hall from 6 o'clock to 11 o'clock on the evening in question. One affidavit was filed by Barrow and the other by Chas. K. Millwood. In order to justify a new trial on the ground of newly discovered evidence it must appear that the evidence will probably change the result if the new trial is granted. The evidence must have been discovered since the trial and the affidavits must show that it could not have been discovered before the trial by the exercise of due diligence. It must be material to the issue. It must not be merely cumulative or in the nature of impeaching evidence. People v. Williams, 248 Ill. 147. In People v. Johnson, 278 Ill. 32, on page 50, it was said; "Applications for a new trial on the ground of newly discovered evidence are not looked upon with favor by the courts, and, in order to prevent, as far as possible, fraud and imposition which the defeated parties might be tempted to practice as a last resort to escape the consequences of an adverse verdict, such application will be subject to the closest scrutiny by the court, and the burden will be upon the applicant to rebut the presumption that the verdict is correct and that there was no lack of due diligence." The indictment was returned in October, 1922. The trial was on December 12, 1922. The name of Millwood was on the back of the indictment as a witness for the people. Plaintiff in error had knowledge of this fact and if he desired to do so he could have talked to the witness and ascertained what he knew about the case and this would probably have resulted in the discovery of the evidence set out in the affidavit. Millwood was apparently not a hostile witness to the plaintiff in error. Barrow's pool room was mentioned in the case almost from the beginning. It is apparent that the exercise of due diligence by the plaintiff in error would have discovered the evidence in ample time to have secured it on the trial. From the facts presented we think the trial court was justified in overruling

the motion for a new trial.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of Oct. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7195

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A.

BE IT REMEMBERED, that afterwards, to-wit: On AUG 13 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Elizabeth Burcham and W.J. Burcham,
appellees,
vs.
J. A. Bowman and Thomas Hogg, co-partners,
appellants,

Appeal from Circuit Court of Stark County.

Partlow, P.J.

231 I.A. 623

Appellees, Elizabeth Burcham and W. J. Burcham, her husband, began suit before a justice of the peace in Stark county against J. A. Bowman and Thomas Hogg, co-partners. There was a judgment in favor of appellee for $185.00 and an appeal was prosecuted to the circuit court of Stark county, where there was a trial by jury, judgment against appellants for $239.69, and a further appeal was prosecuted to this court.

No complaint is made of any ruling on evidence, or upon the giving or refusing of instructions, except as to the tenth instruction given on behalf of appellees, and there is no error pointed out in that instruction. The only error urged is that the verdict is contrary to the law and the evidence.

The evidence shows that appellants manufacture graphaphones at Toulon, Illinois. They made the cabinets and purchased the motors which operated with a spring wound by hand. On November 12, 1920, appellants went to the home of appellees with one of their machines which they demonstrated to appellees. The machine was sold to appellees for $225 and appellants took in exchange an old machine for $40, and received $100 in cash and a note for $85., due in six months. It is contended by appellees that appellants warranted that the cabinet of the machine was genuine mahogany; that it had an Edison motor; that it would run five years without oiling, and guaranteed the machine for ten years. This warranty in all respects is denied by appellants, who testified that they told appellees the machine contained a Universal master motor which was the best motor money can buy and was as

Elizabeth Burcham and W.W. Burcham,

appellees,

vs.

I. A. Bowman and Thomas Hogg, co-partners,

appellants.

Appeal from district court of Stark county.

Partlow, P.J.

Appellees, Elizabeth Burcham and W. W. Burcham, for brevity, hereafter sometimes referred to as plaintiffs, brought suit before a justice of the peace in Stark county against I. A. Bowman and Thomas Hogg, co-partners. There was a judgment in favor of appellee for $138.00 and an appeal was prosecuted to the district court of Stark county, where there was a trial by jury. Judgment against appellants for $889.00, and a further appeal was prosecuted to this court.

No complaint is made of any ruling on evidence, or upon the giving or refusing of instructions, except as to the seventh instruction given on behalf of appellees, and there is no error pointed out in that instruction. The only error urged is that the verdict is contrary to the law and the evidence.

The evidence shows that appellants manufacture fireplaces at Dunn, Illinois. They made the castings and presented the motors which operated with a spring wound by hand. On November 15, 1920, appellants went to the home of appellees with one of their machines which they demonstrated to appellees. The machine was sold to appellees for $325 and appellants took in exchange an old machine for $40, and received $100 in cash and a note for $85., due in six months. It is contended by appellees that appellants warranted that the output of the machine was twenty cubic feet of gas per hour, and guaranteed the machine for one year. This warranty in all respects is denied by appellants, who testified that they told appellees the machine contained a universal motor which was the best motor money can buy and was so

good as an Edison motor, and that they stated that the wood in the cabinet was red gum, which was the standard wood used in making that kind of cabinets. The machine was delivered to the appellees and remained in their home until some time in June, 1921, without complaint from the appellees. When the note for $85 became due in May, 1921, it was paid. Appellees first complained to appellants with reference to some of the alleged defects on June 4, 1921, when their daughter told the appellants that the cabinet was warped and split at the place where the arm was fastened to the cabinet by screws. She requested appellants to make repairs, and appellants agreed to do so but failed to comply with the agreement. Appellees went to the city of Kewanee about June 28th and had a talk with a dealer in graphaphones. About July 2, 1921, this man went to the home of appellees to see the instrument. He took out the motor, examined it, and told the appellees it was not an Edison motor but was a Universal motor. Appellees claim this was the first knowledge they had as to the kind of a motor which was in the machine and as to the kind of wood which composed the cabinet. Immediately after the Kewanee agent examined the machine, Purcham went to Toulon and told Bowman that appellees were going to bring the machine back and he demanded a return of their money. Bowman testified he offered to make the machine right and to replace it with another machine, but appellees refused to take another machine and demanded the money back. Appellees testified the machine did not play right, did not play the number of records stated by appellants, that it had a different motor, that the material in the cabinet was not mahogany, and the wood was fraudulently concealed by varnish which made the wood look like mahogany, that when the wood became seasoned it began to split and crack and appellees then learned that the cabinet was made of green gum; that they tendered the machine back to the appellants, and that appellants were never refused permission to fix the machine, or come to the home of appellees and remedy the defects until after appellees had tendered the machine back and made a demand for the purchase price.

good as an Edison motor, and that they stated that the wood in the cabinet was red gum, which was the standard wood used in making that kind of cabinets. The machine was delivered to the appellees and remained in their home until some time in June, 1921, without complaint from the appellees. When the note for $25 became due in May, 1921, it was paid. Appellees first complained to appellants with reference to some of the alleged defects on June 4, 1921, when their daughter told the appellants that the cabinet was warped and split at the place where the arm was fastened to the cabinet by screws. The requested appellants to make repairs, and appellants agreed to do so but failed to comply with the agreement. Appellees went to the city of Texarkana about June 25th and had a talk with a dealer in Graphophones. About July 8, 1921, the two went to the home of appellees to see the instrument. He took out the motor, examined it, and told the appellees it was not an Edison motor but was a Universal motor. Appellees claim this was the first knowledge they had as to the kind of a motor which was in the machine and as to the kind of wood which composed the cabinet. Immediately after the Texarkana agent examined the machine, Bowman went to Dunlap and told Bowman that appellees were going to bring the machine back and he demanded a return of their money. Bowman testified he offered to make the machine right and to replace it with another machine, but appellees refused to take another machine and demanded the money back. Appellees testified the machine did not play right, did not play the number of records stated by appellants, that it had a different motor, that the material in the cabinet was not mahogany, and the wood was fraudulently concealed by varnish which made the wood look like mahogany, that when the wood became seasoned it began to split and crack and appellees then learned that the cabinet was made of green gum; that they tendered the machine back to the appellants, and that appellants were never refused permission to fix the machine, or come to the home of appellees and remedy the defects until after appellees had tendered the machine back and made a demand for the purchase

As grounds for reversal appellants claim that after appellees asked appellants to take the machine back they continued to use it and permitted appellees' children to run it as they pleased even up to the time of the trial; that there was no breach of warranty shown by the evidence; that appellants' statement that they would guarantee it for ten years was not a warranty or agreement to take it back at any time within ten years; that the offer of appellees to return the machine after seven months use with no offer to restore the lid which appellees split, and no offer to accept the old machine from appellants was not an offer to put the appellants in status quo; that appellees' delay in not objecting to the kind of wood when the wood was visible at all times in the interior of the machine and at the place where the wood was split was a waiver; that the agreement with appellees' daughter on June 4 to fixm the machine and the refusal of appellees to permit appellants to fix it was also a waiver; that the failure in tone complained of could only come from a wearing of the changeable mechanical devices, needles and diaphrams, which had never been changed so far as the evidence shows.

The most that can be said of the evidence is that it presented questions of fact for the jury. It is undisputed that the appellants sold to appellees the graphaphone. There is a sharp conflict in the evidence as to the agreement at the time of the sale. Appellees testify to specific warranties and guaranties which are denied by appellants. It was a question of fact for the jury to say whether these warranties were or were not made. The jury found that they were in fact made. This finding is supported by the evidence and this court will not set aside the finding unless it is clearly against the weight of the evidence which we cannot say in this case. Lourance vs. Goodmar, 170 Ill. 393. After the machine was delivered it remained in appellees' home for almost seven months without complaint and during this time the note for $85 was paid by appellees. The only excuse for this delay is that the defects did not appear or were not discovered until

is that the salesmen did not appear or were not discovered until for $85 was paid by appellees. The only excuse for the delay most seven months without complaint and during this time $2.- note

the machine was delivered it remained in appellees' home for al-

say in this case. Dunmeree vs. Goodwin, 38 IND 111. 1903. After

it is clearly against the weight of the evidence which we cannot

the evidence and this court will not set aside the finding unless

found that they were in fact made. This finding is supported by

are denied by appellants. It was a question of fact for the jury

to say whether these warranties were or were not made. The jury

Appellees testify to specific warranties and warranties which

in the evidence as to the agreement at the time of the sale.

Iantz sold to appellees the graphophone. There is a sharp conflict

questions of fact for the jury. It is maintained that the appel-

The most that can be said of the evidence is that it presented

attempt more.

modles and diagrams, which had never been changed so far as the

only come from a working of the changeable mechanical devices,

it was also a waiver; that the failure in this respect of could

machine and the refusal of appellees to permit appellants to fix

that the agreement with appellees' number on Form 4 to view the

the machine and at the place where the wood was split was a waiver;

wood when the wood was viable at all times in the interior of

status quo; that appellees' delay is not objecting to the kind of

machine from appellants was not an effort to put the appellants in

the bid which appellees split, and no effort to accept the old

return the washing after seven months use with no effort to restore

back at any time within ten years; that the offer of appellees to

tee it for ten years was not a warranty or agreement to take it

by the evidence; that appellants' statement that they would guaran-

to the time of the trial; that there was no breach of warranty shown

and permitted appellees' children to run it as they pleased even af-

asked appellants to take the machine back they combined to use it

As grounds for reversal appellants claim that after appellees

after the note was paid. It is true that a piece of wood was split off of the case before this time, but the most of the defects, it is claimed were unknown to appellees until the visit of the Kewanee agent on July 2. He took out the motor, examined it and informed appellees that it was not an Edison motor, but was a Universal motor. About this time, the evidence on behalf of appellees shows, they discovered that the case was not mahogany but was red gum. Immediately on discovering these facts, appellees complained to appellants and demanded that the contract be complied with. There is a dispute as to the offers of settlement. Appellants claim they offered to make the machine right, but there is no evidence of any offer to furnish a machine having an Edison motor and a mahogany case. If appellees' contention is correct the mere repair of the machine, or the replacement of it with another mahine which did not have an Edison motor and a mahogany case would not be a compliance with the contract. There is also a conflict in the evidence as to the tender of the machine by appellees. All of these questions were for the jury to determine. As the verdict is not against the weight of the evidence we do not feel justified in reversing the judgment. Marble v. Marble, 304 Ill. 229.

We find no reversible error and the judgment is affirmed.

Judgment affirmed.

We find no reversible error and the judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 21st day of Sept. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7704

R. H denied Oct 1923

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 623

BE IT REMEMBERED, that afterwards, to-wit: On AUG 7 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Charles Esterdahl,
appellant,
vs.
Edward Haugens,
appellee,

Appeal from the Circuit Court
of Marshall County

231 I.A. 623

Partlow, P.J.

The appellant, Charles Esterdahl, began suit in the circuit court of Marshall County against the appellee, Edward Haugens, to recover $1236.59 alleged to be the amount due on the purchase price of 5989.02 bushels of oats at $1.11 per bushel which were sold by appellant to appellee. Appellee, before the suit was commenced, paid the appellant $3000.00 and tendered $191.25 on the trial. There was a verdict for appellee. Judgment was entered on the verdict, and this appeal was prosecuted.

Appellee ran an elevator at Evans, Illinois, and appellant was a farmer living a mile east of the elevator. Appellee testified that on December 10, 1919, appellant came to his elevator and told appellee that he had about 4000 bushels of oats for sale. Appellant said that when oats reached eighty cents per bushel to mark appellant's oats as sold. Appellee is corroborated as to this conversation by Jesse Kessler, who was present at the time it took place, except that Kessler did not hear anything said about there being 4000 bushels, Appellee testified that on December 18, 1919, oats reached eighty cents, and he at that time made an entry on his books marking appellant's oats as sold. He testified that he then called appellant's home on the telephone and told Mrs. Esterdahl, who answered the phone, to tell appellant that appellee had marked appellant's oats sold at eighty cents. As to the telephone conversation appellee was corroborated by Charles Johnson, who testified that he heard this conversation, and that later, between January 20 and 25, appellant told him he was not satisfied with the sale because he thought the old oats should have brought more money. Appellee further testified that on December 20, 1919, appellant, appellee and another man drove to Toluca, Illinois,

Charles Esterbani,

appellant,

v.

Edward Hampton,

appellee,

Harlow, P.J.

2311.A.623

Appeal from the Circuit Court
of Marshall County

The appellant, Charles Esterbani, began suit in the circuit court of Marshall County against the appellee, Edward Hampton, to recover $1256.80 alleged to be the amount due on the purchase price of 2989.02 bushels of oats at $.11 per bushel which were sold by appellant to appellee. Appellee, before the suit was commenced, paid the appellant $2000.00 and tendered $131.80 on the trial. There was a verdict for appellee. Judgment was entered on the verdict, and this appeal was prosecuted.

Appellee ran an elevator at Ivana, Illinois, and appellant was a farmer living a mile east of the elevator. Appellee testified that on December 10, 1919, appellant came to his elevator and told appellee that he had about 4000 bushels of oats for sale. Appellant said that when oats reached eighty cents per bushel he would sell appellant's oats as sold. Appellee is corroborated as to this conversation by Jesse Keesler, who was present at the time it took place, except that Keesler did not hear anything said about there being 4000 bushels, Appellee testified that on December 18, 1919, oats reached eighty cents, and he at that time made an entry on his books stating appellant's oats as sold. He testified that he then called appellant's home on the telephone and told Mrs. Esterbani, who answered the phone, to tell appellant that appellee had marked appellant's oats sold at eighty cents. As to the telephone conversation appellee was corroborated by Charles Johnson, who testified that he heard this conversation, and that later, between January 20 and 25, appellant told him he was not satisfied with the sale because he thought the oats should have brought more money. Appellee further testified that on December 30, 1919, appellant, appellee and another man drove to Toluca, Illinois,

and on the trip appellant spoke about the price of old oats, and said he thought old oats ought to be worth more than new oats, and appellee replied that some markets would offer more for old oats, but the market in which appellee was dealing that day was taking the lighter oats at the same price they were paying for the heavier oats and for that reason appellee could not get a premium on old oats. On February 28, 1920, appellant asked appellee to pay $3000.00 on the oats, which was done. About a month or two before June 1, and again on June 10 or 12, appellee notified appellant that he was ready to take the oats. Appellant began delivery June 18 and finished June 21. When the time came for payment appellant demanded $1.11 per bushel, which was the market price at the time the oats were delivered, and he contended that he had not sold the oats at eighty cents.

Appellant's version of the transaction is that he had no conversation with appellee on December 10, and no offer of sale was made by him; that he was not at the elevator on that date, but was at work in his field with two hired men, who corroborated him in that respect. Appellant testified he had a conversation with appellee on January 27, at the elevator, and appellant asked appellee why appellee had not notified appellant to move the oatswhich appellee had bought, but appellee did not reply. Appellant testified he told appellee that appellant would get eighty-five cents for his oats some day; that appellee telephoned to appellant's house the first part of February, and after this telephone call appellant went to the elevator and told appellee that appellee had no business to telephone appellant's wife, as appellant had not sold his oats and wanted appellee to understand it; that on the ride to Toluca they talked about a premium on old oats. Appellant admitted that on February 28, he received $3000.00 from appellee; that the oats were delivered in June; that the market price at the time of delivery was $1.11 and he claims he was entitled to recover at that rate.

The principal ground of reversal urged is that the alleged contract of sale testified to by appellee was never made; that if

The principal ground of reversal urged in that the alleged contract of sale testified to by Appellee was never made; that it was made by him; that he was not at the elevator on that date, but was at work in his field with two hired men, who corroborated him in that respect. Appellant testified he had a conversation with Appellee on January 27, at the elevator, and Appellant asked Appellee why Appellee had not notified Appellant to move the cottonseed Appellee had bought, but Appellee did not reply. Appellant testified he told Appellee that Appellant would get eighty-five cents for his cake some day; that Appellee telephoned to Appellant's home the first part of February, and after this telephone call Appellant went to the elevator and told Appellee that Appellee had no business to telephone Appellant's wife, as Appellant had not sold his cake and wanted Appellee to understand it; that on the ride to Tolima they talked about a premium on old cake. Appellant admitted that on February 28, he received $5000.00 from Appellee; that two cars were delivered in June; that the market price at the time of delivery was $1.11 and he claims he was entitled to recover at that rate.

Appellant's version of the transaction is that he had no conversation with Appellee on December 11, nor on either of the days made by him; that he was not at the elevator on that date, but was at work in his field with two hired men, who corroborated him in that respect. Appellant testified he had a conversation with Appellee on January 27, at the elevator, and Appellant asked Appellee why Appellee had not notified Appellant to move the cottonseed Appellee had bought, but Appellee did not reply. Appellant testified he told Appellee that Appellant would get eighty-five cents for his cake some day; that Appellee telephoned to Appellant's home the first part of February, and after this telephone call Appellant went to the elevator and told Appellee that Appellee had no business to telephone Appellant's wife, as Appellant had not sold his cake and wanted Appellee to understand it; that on the ride to Tolima they talked about a premium on old cake. Appellant admitted that on February 28, he received $5000.00 from Appellee; that two cars were delivered in June; that the market price at the time of delivery was $1.11 and he claims he was entitled to recover at that rate.

The principal ground of reversal urged is that the alleged contract of sale testified to by Appellee was never made; that it

it was made it was indefinite as to the amount of oats, the terms of payment, and the time of delivery; that the contract was not mutual for the reason that it was left to appellee's discretion whether he would buy the oats when they reached eighty cents, and appellant could not enforce this agreement against appellee; that it was invalid under section 4 of the Uniform Sales Act, because none of the provisions of the Act were complied with.

Section 4 of the Uniform Sales Act (Cahill's Statutes, Chap. 121 A, p. 3036) provides that a contract to sell, or a sale, of any goods or choses in action of the value of $500.00 or upwards, shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receives the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent on that behalf.

If the jury decided the case entirely upon the evidence offered by appellant it would necessarily follow that the verdict would have to be in his favor. If, on the other hand, the jury believed the evidence offered by appellee, we think it was sufficient to sustain the verdict in appellee's favor. Appellee testified that appellant told him when oats reached eighty cents to mark appellant's oats as sold. This merely constituted an offer on behalf of appellant to sell his oats to appellee. Of course appellee was not bound to accept this offer unless he saw fit so to do. No one would contend that such an offer constituted a contract. When the oats reached eighty cents on December 18, appellee made an entry on his books and marked appellant's oats as sold. In addition to this, he called appellant's home on the telephone and told Mrs. Esterdahl to inform her husband that he had marked his oats as sold. In this he is corroborated by Johnson, and Mrs. Esterdahl admits that the telephone call was made. It is true that appellant denies he made any offer of sale on December 10. Appellee is not only corroborated in his statement that the offer of sale was made, but it is strange if no offer had been made that appellant would telephone to Mrs. Esterdahl

offer had been made that appellee would telephone to Mrs. Underhill
statement that the offer of sale was made, but it is strange if it
of sale on December 10. Appellee is not only uncorroborated in his
call was made. It is true that appellant cannot be made any other
corroborated by Johnson, nor Mrs. Underhill except that the telephone
her husband that he had marked his cards as sold. In this he is
and marked appellant's cards as sold. In addition to this, he called
appellant's home on the telephone and told Mrs. Underhill to inform
night cards on December 18, appellee made an entry on his books
that such an offer constituted a contract. When the cards reached
accept this offer unless he saw fit so to do. No one would use a
sell his cards to appellee. Of course appellee was not bound to
told him when cards reached eighty cents to mark appellant's cards so
sold. This merely constituted an offer on behalf of appellant to
by appellant it would necessarily follow that the verdict would have
to be in his favor. If, on the other hand, the jury believed the
evidence offered by appellee, we think it was sufficient to sustain
the verdict in appellee's favor. Appellee testified that appellant
actually received the same, or give something in exchange to bind the
contract, or in part payment, or unless some note or memorandum in
writing of the contract or sale be signed by the party to be charged
or his agent on that behalf.

If the jury decided the case entirely upon the evidence offered
goods or choses in action so contracted to be sold or sold, and
be enforceable by action unless the buyer shall accept part of the
or choose in action of the value of $500.00 or upwards, shall not
A. p. 3036) provides that a contract to sell, or a sale, of any goods
Section 4 of the Uniform Sales Act (Smith's Statutes, Ann. 121
it was invalid under section 4 of the Uniform Sales Act, because
more of the provisions of the Act were complied with.
mutual for the reason that it was left to appellee's discretion
of payment, and the time of delivery; that the contract was not
it was made it was indefinite as to the amount of cards, the terms

that the oats were sold. We think the evidence of Mrs. Esterdahl, taken in connection with all the other evidence in the case, establishes both the offer and the acceptance, and both of these were necessary to constitute a valid contract. It may be true that the title did not pass at the time the offer was accepted, and that the contract could not be enforced for the reason that it did not comply with section 4 of the Uniform Sales Act. Chicago Metal Roofing Co. vs. Jerome Trading Co., 218 Ill. App. 333; West vs. Kenney, 220 Ill. App. 48; Sheehan vs. Reardon, 223 Ill. App. 365. But the transaction did not end at this point. It has been held under statutes similar to our Uniform Sales Act that the payment, or partial delivery, provided for in the statute, need not be made at the time the contract is entered into, but that it may be made subsequently to the contract, and that when these conditions are complied with the contract is valid and binding and can be enforced. 25 R.C.L., sec. 236, 261; 20 Cyc. 251. It is undisputed that on February 28 appellee paid appellant $3000.00. Appellant seeks to avoid the effect of this payment by saying that it is customary for farmers to get money or advancements on their grain from the operators of elevator companies and that this is no evidence tending to sustain the contract in this case. We think, however, that the preponderance of the evidence not only tends to show that there was a contract of sale and an acceptance of the same, but the evidence also shows that the $3000.00 received by appellant was paid in pursuance of the contract and as a part payment on the oats under the contract. In June the oats were delivered and appellant contends this was the first and only valid contract of sale and appellant was entitled to receive $1.11 which was the then market price of oats. Every point in question was determined by the jury contrary to the contention of appellant, and we think the jury was justified in its finding. From the evidence we think there was a valid binding contract of sale which was carried out by the payment of the $3000.00, by the delivery of the oats and that the contract price was eighty cents per bushel as found by the jury, and not $1.11 per bushel as contended by the appellant.

that the date were void. We think the evidence of Mr. Hemmens, taken in connection with all the other evidence in the case, satisfies both the offer and the acceptance, and that of their necessity to constitute a valid contract. It may be true that the [illegible] did not pass at the time the offer was accepted, and that the contract could not be enforced for the reason that it did not comply with section 4 of the Uniform Sales Act. [illegible] Metal Roofing Co. vs. Jerome Trading Co., 218 Ill. App. 355; West Va. Kenney, 180 Ill. App. 4; Plumber vs. Stevens, 141 Ill. App. [illegible]. but the [illegible] did not end at this point. It has been held under other decisions to our Uniform Sales Act that the payment, or partial delivery, provided for in the statute, need not be made at the time the contract is entered into, but that it may be made subsequently to the contract, and that when these conditions are complied with the contract is valid and binding and can be enforced. 28 N.E.R., 2nd. 880, 881; 90 Pac. 221. It is maintained that on February 28 appellee paid appellant $5000.00. Appellant seeks to avoid the effect of this payment by saying that it is customary for farmers to get money or advancements on their grain from the operators of elevator companies and that this is no evidence tending to sustain the contract in this case. We think, however, that the preponderance of the evidence not only tends to show that there was a contract or sale and an acceptance on the part, but the evidence also shows that the $5000.00 received by appellant was paid in pursuance of the contract and as a part payment on the date under the contract. In fact the only testimony and explanation concerning this was the first and only valid contract of sale had appellant was entitled to receive $1.11 which was the final market price of corn. Every point in question was determined by the jury contrary to the contention of appellant, and we think the jury was justified in its finding. From the evidence we think there was a valid binding contract of sale which was carried out in the payment and [illegible] of the $5000.00, by the delivery of the corn and the contract price was clearly paid or tendered as soon by the jury, and [illegible] $1.11 per bushel as contended by the appellant.

Complaint is made of the refusal of the court to give two instructions offered by appellant. The third instruction given on behalf of appellant substantially states the provisions of the Uniform Sales statute applicable to the facts in this case. The second refused instruction merely applied the statute to the facts, and was a repetition of the third given instruction. We think the instructions given cover the other refused instruction. Only one instruction was given on behalf of the appellee and appellant contends it was not marked given but was read to the jury, and this is assigned as error. It has been held that it is not error to read an instruction to the jury which is not marked given. Worlds Columbian Exposition vs. Bell, 76 Ill. App. 591; Robin vs. The People, 101 Ill. 121.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

Complaint is made of the refusal of the court to give two instructions offered by appellant. The third instruction given on behalf of appellant substantially states the provisions of the Uniform Sales statute applicable to the facts in this case. The second refused instruction merely applied the statute to the facts, and was a repetition of the third given instruction. We think the instructions given cover the other refused instruction. Only one instruction was given on behalf of the appellee and appellant complains it was not marked given but was read to the jury, and this is unaligned as error. It was been held that it is not error to read an instruction to the jury which is not marked given. Peoria [illegible] Co. Bell, 74 Ill. App. 647, Chicago &c. Ry. Co. v. Ray, 101 Ill. 121.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of Oct. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7707

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 323

BE IT REMEMBERED, that afterwards, to-wit: On AUG 19 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Homer H. Stull,

appellant,

vs.

J. Theodore Look,

appellee,

Appeal from Circuit Court

of Kankakee County

2311

Partlow, P.J.

Appellant, Homer H. Stull, obtained a judgment by confession for $669.00 in the circuit court of Kankakee county against J. Theodore Look upon a note for $600.00, dated June 29, 1921, due in ninety days after date with interest at six per cent from date if not paid when due. The judgment was subsequently opened and appellee filed a plea of non assumpsit, a second plea of set-off, and a third plea which alleged that the note was delivered conditionally. There was a trial by jury, a verdict finding for the appellant as to his claim, also for appellee under the plea of set-off and that there was a balance due appellee over and above appellant's claim in the sum of $260.00. Judgment was rendered against appellant for $260.00 and this appeal was prosecuted.

The principal ground of reversal urged is that the evidence does not sustain appellee's claim of set-off, does not show the note was conditionally delivered and does not sustain the verdict.

On several material points the evidence is in sharp conflict. On behalf of the appellee, the evidence shows that on June 2, 1921, appellee, who was a real estate agent in Kankakee, Illinois, obtained from Frederick Bertrand a written contract giving appellee the exclusive agency to sell eighty acres of land in Kankakee county belonging to Bertrand for $150.00 per acre. The option was for ninety days and thereafter not to exceed six months or until the agreement was revoked by notice in writing from Bertrand. The commission was to be $5.00 per acre. A few days after the option was signed, appellee had a conversation relative to the land with

Homer H. Stull,

appellant,

vs.

T. Theodore Look,

appellee,

Appeal from Circuit Court
of Kankakee County

Partlow, P.J.

Appellant, Homer H. Stull, obtained a judgment by confession for $665.00 in the circuit court of Kankakee county against T. Theodore Look upon a note for $600.00, dated June 29, 1921, due in ninety days after date with interest at six per cent from date if not paid when due. The judgment was subsequently opened and appellee filed a plea of non assumpsit, a second plea of set-off, and a third plea which alleged that the note was delivered conditionally. There was a trial by jury, a verdict finding for the appellant as to his claim, also for appellee under the plea of set-off and that there was a balance due appellee over and above appellant's claim in the sum of $260.00. Judgment was rendered against appellant for $260.00 and this appeal was prosecuted.

The principal ground of reversal urged is that the evidence does not sustain appellee's claim of set-off, does not show the note was conditionally delivered and does not sustain the verdict.

On several material points the evidence is in sharp conflict. On behalf of the appellee, the evidence shows that on June 8, 1921, appellee, who was a real estate agent in Kankakee, Illinois, obtained from Frederick Bertrand a written contract giving appellee the exclusive agency to sell at $75 acres of land in Kankakee county belonging to Bertrand for $130.00 per acre. The option was for ninety days and thereafter not to exceed six months or until the agreement was revoked by notice in writing from Bertrand. The commission was to be $3.00 per acre. A few days after the option was signed, appellee had a conversation relative to the land with

appellant, who was also a real estate agent in Kankakee, Illinois. They went to look at the land. Appellee testified appellant said he had a buyer, but the price at which the land was offered was too cheap, and there was an opportunity for them to make some money out of the deal. Appellant suggested they buy the land together and share equally in the profits, and appellee contends this agreement was made. Appellant wrote to William Haremski, his prospective buyer, and asked him to look at the land. Haremski and wife went to look at the land. On that day appellant was in Arkansas and the land was shown to them by appellee and an agent from appellant's office. Appellant returned from Arkansas the next day and had a talk with appellee concerning their visit to the land and appellant sent for Haremski. There were certain negotiations and conversations between the appellant and appellee, and appellee contends it was agreed the land should be purchased from Bertrand and sold to Haremski. There was some discussion as to who should take the title, and it is claimed by appellee that the title was taken in the name of the appellant for both appellant and appellee. Under a contract which bears date June 24, 1921, Bertrand agreed to convey the land to appellant for $150.00 per acre. Under a contract bearing date June 25, 1921, appellant agreed to convey the land to Haremski for $175.00 par acre. It is the contention of the ~~contention of the~~ appellee that these are not the correct dates of these instruments, but that the contract with Haremski was executed prior to the contract with Bertrand. It is further contended by appellee that after the land was sold to Haremski, on the same day and after appellant had received $9000.00 from the purchaser, appellant asked appellant for his share of the profits. Appellant objected on the ground that the title might not be satisfactory and the deal might not be finally closed. It is the claim of the appellee that in order to secure appellant in case the deal should fail, appellee ~~appellant~~ gave appellant his note for $600.00 due in ninety days, the note being in evidence of the advanced payment of a part of the appellee's share of the profit. If the deal was finally closed the note was to be returned

appellant, who was also a real estate agent in Hamboke, Illinois. They went to look at the land. Appellee testified appellant said he had a buyer, but the price at which the land was offered was too cheap, and there was an opportunity for them to make some money out of the deal. Appellant suggested they buy the land together and share equally in the profits, and appellee contends this agreement was made. Appellant wrote to William Heremski, his prospective buyer, and asked him to look at the land. Heremski and wife went to look at the land. On that day appellant was in Arkansas and the land was shown to them by appellee and an agent from appellant's office. Appellant returned from Arkansas the next day and had a talk with appellee concerning their visit to the land and appellant sent for Heremski. There were certain negotiations and conversations between the appellant and appellee, and appellee contends it was agreed the land should be purchased from Bertrand and sold to Heremski. There was some discussion as to who should take the title, and it is claimed by appellee that the title was taken in the name of the appellant for both appellant and appellee. Under a contract which bears date June 24, 1921, Bertrand agreed to convey the land to appellant for $130.00 per acre. Under a contract bearing date June 25, 1921, appellant agreed to convey the land to Heremski for $175.00 per acre. It is the contention of the [redacted] appellee that these are not the correct dates of those instruments, but that the contract with Heremski was executed prior to the contract with Bertrand. It is further contended by appellee that after the land was sold to Heremski, on the same day and after appellant had received $9000.00 from the purchaser, appellant asked appellant for his share of the profits. Appellant objected on the ground that the title might not be satisfactory and the deal might not be finally closed. It is the claim of the appellee that in order to secure appellant in case the deal should fail, [redacted] appellee gave appellant his note for $6000.00 due in ninety days, the note being in evidence of the advanced payment of a part of the appellee's share of the profit. If the deal was finally closed the note was to be returned

and appellee was to receive the balance of the profit. If the deal was not consummated the $600.00 was to be repaid by appellee to appellant. On these terms appellant advanced $600.00 to appellee and took his note. The sale was finally consummated, and the profit collected by the appellant. It is the claim of the appellee that appellant repudiated the agreement as to the division of the profits and claimed he was the only person interested in the transaction.

On the other hand, the evidence on behalf of the appellant shows that he had a talk with appellee shortly after June 2, 1921, relative to the sale. They went to look at the farm and appellant wrote to Haremski concerning it. Appellant claims that on June 23, 1921, appellee came to the office of appellant and told appellant that Bertrand had just informed appellee that if appellee did not sell the farm by noon of that day Bertrand would sell it to Bertrand's brother. Appellee told appellant if he did not sell the farm that day appellee would lose the option and his commission. Thereupon appellant suggested they buy it together and share in the profits. Appellee replied that he could not afford to do so as he did not have the money. Appellant testified he told appellee that if appellee would not join with him in the purchase that appellant would purchase it and take chances on selling it at a profit. Thereupon appellant drafted a contract between Bertrand and appellant, which recited that Bertrand should deliver the premises forthwith and should pay the taxes. This contract signed by appellant, together with his check for $500.00, was delivered to appellee. The next morning, June 24, 1921, appellant, appellee, Bertrand and his wife, met in the office of A. E. Smith, the attorney for Bertrand. A new contract was drawn in which appellant assumed the taxes. This contract was executed and delivered to the appellant together with the check for $500.00 which appellant had given to appellee the day before. On June 25, 1921, appellant entered into a contract with Haremski, but the deed was not executed until June 29, 1921. On June 29, 1921, and not on June 25, 1921, as claimed by appellee, the evidence on behalf of the appellant shows, appellee went to the appellant's

behalf of the appellant alone, appellee went to the appellant's and not on June 25, 1921, as claimed by appellee, the evidence on but the deed was not executed until June 29, 1921. On June 29, 1921, June 25, 1921, appellant entered into a contract with Bernard, $300.00 which appellant had given to appellee the day before. On executed and delivered to the appellant together with the check for the lands. This contract was drawn in which appellant assumed the taxes. This contract was the office of A. M. Smith, the attorney for Bertrand. A new contract June 24, 1921, appellant, appellee, Bertrand and his wife, met in check for $300.00, was delivered to appellee. The next morning, the taxes. This contract signed by appellant, together with his that Bertrand should deliver the premises forthwith and should pay drafted a contract between Bertrand and appellant, which recited it and take chances on selling it at a profit. Thereupon appellant would not join with him in the purchase that appellant would purchase have the money. Appellant testified he told appellee that if appellee Appellee replied that he could not afford to do so as he did not day appellee would lose the option and his commission. Thereupon appellant suggested they buy it together and share in the profits. brother. Appellee told appellant if he did not sell the farm that the farm by noon of that day Bertrand would sell it to Bertrand's Bertrand had just informed appellee that if appellee did not sell appellee came to the office of appellant and told appellant that Harewell concerning it. Appellant claims that on June 24, 1921, to the sale. They went to look at the farm and appellant wrote to that he had a talk with appellee shortly after June 8, 1921, relative and claimed he was the only person interested in the transaction.

On the other hand, the evidence on behalf of the appellant shows appellant represented the agreement as to the division of the profits collected by the appellant. It is the claim of the appellee that appellant. On these terms appellant advanced $300.00 to appellee and took his note. The sale was finally consummated, and the profit was not consummated the $800.00 was to be repaid by appellee to and appellee was to receive the balance of the profits. If the deal

office and stated that he had to advance $1000.00 to his brother, was short of money and requested a loan of $600.00 for sixty days. It was agreed the loan should be made for ninety days and the note was executed by appellee and he received a check for $600.00. When the note fell due, demand was made for payment and refused, appellee contending there had been an oral agreement between the appellee and the appellant that appellant should sign the contract with Bertrand for the purchase of the farm and they should share in the profits equally, including the commission which appellee would be entitled to under his option. Appellee contended that there had been a profit of $2200.00 of which he had realized only $240.00 and there was due him a balance. The appellant denied there had been any such agreement, and refused to recognize appellee's right to any of the profits.

There are other facts in evidence which the parties insist have some bearing on the case, but we have stated the principal parts of the evidence and all that are necessary to a determination of the questions at issue. We have read the evidence with great care. The most that can be said of it is that it is in sharp conflict on many material points. Under the law, we have no right to disturb the judgment unless it is clearly against the weight of the evidence. Marble vs. Marble, 304 Ill. 229. If the jury believed the evidence on behalf of the appellant, he was entitled to a judgment for the full amount of the note. If, on the other hand, the jury believed the evidence on behalf of the appellee, the judgment as rendered is correct. No good purpose would be served in expressing our views in detail. All we deem it necessary to say is that we do not think the judgment is against the weight of the evidence. For this reason the court was not in error in refusing to direct a verdict, or in overruling the motion for a new trial or in overruling the motion in arrest of judgment.

Appellant insists that by his plea of set off, appellee admitted appellant's claim of $669.00; that appellee attempts to evade this admission, and show not only that he was not liable on the note, but that appellant owed him $260.00 in addition thereto;

the note, but that appellant owed him $200.00 in addition thereto; evade this admission and show not only that he was not liable on alleged appellant's claim of $665.00; that appellee attempts to in arrest of judgment.

Appellant insists that by his plea of set off, appellee admitted the execution of the note. If, on the other hand, the jury believed the evidence on behalf of the appellee, the judgment as rendered is correct. No good purpose would be served in expressing our views in detail. All we deem it necessary to say is that we do not think the judgment is against the weight of the evidence. For this reason the court was not in error in refusing to direct a verdict, or in overruling the motion for a new trial or in overruling the motion in arrest of judgment.

Appellant insists that by his plea of set off, appellee admitted appellant's claim of $665.00; that appellee attempts to evade this admission and show not only that he was not liable on the note, but that appellant owed him $200.00 in addition thereto; office and stated that he had to advance $1000.00 to his brother, was short of money and requested a loan of $600.00 for sixty days. It was agreed the loan should be made for ninety days and the note was executed by appellee and he received a check for $600.00. When the note fell due, demand was made for payment and refused, appellee contending there had been an oral agreement between the appellee and the appellant that appellant should sign the contract with Bertrand for the purchase of the farm and they should share in the profits equally, including the commission which appellee would be entitled to under his option. Appellee contended that there had been a profit of $2800.00 of which he had realized only $240.00 and there was due him a balance. The appellant denied there had been any such agreement, and refused to recognize appellee's right to any of the profits.

There are other facts in evidence which the parties insist more some bearing on the case, but we have stated the principal parts of the evidence and all that are necessary to a determination of the questions at issue. We have read the evidence with great care. The most that can be said of it is that it is in sharp conflict on many material points. Under the law, we have no right to disturb the judgment unless it is clearly against the weight of the evidence. Martin vs. Martin, 304 Ill. 229. If the jury believed the evidence on behalf of the appellant, he was entitled to a judgment for the full amount of the note. If, on the other hand, the jury believed the

that appellee having admitted by his plea of set off that he owed the amount due on the note, his evidence contradictory thereto is of no avail; that the verdict was based upon evidence offered in support of the plea of set-off and found for the appellee on his plea of set-off which is inconsistent with the evidence as well as the law. This contention would undoubtedly be true if the plea of set-off was the only plea filed. Smith vs. Bellrose, 200 Ill. App. 368; Raymond vs. Kerker, 81 Ill. 381. Appellee not only filed a plea of set-off but he also filed a plea of non-assumpsit which put the appellant on proof of every material allegation of his declaration. Appellee also filed a plea alleging that the note was delivered conditionally. Under this plea appellee had a right to introduce evidence relative to circumstances under which the note was delivered whether conditionally or otherwise. Mannnvs. Smyser, 76 Ill. 365; Great Western Insurance Co. vs. Rees, 29 Ill. 272; McClue vs. Williams, 65 Ill. 390; Gage vs. Lewis, 68 Ill. 604.

Appellant further contends that the evidence does not establish a set-off, but merely shows a recoupment; that the note sued on and appellee's claim of set-off arise out of the same subject matter and therefore there could be no recovery over and above the amount of the set-off; that it would be merely a matter of recoupment at most and consequently the verdict is contrary to the law as applied to the evidence.

The distinction between recoupment and set-off is well understood. The courts of this state, with few exceptions, have never gone farther than to say that a set-off usually arises out of a transaction extrinsic to the plaintiff's cause of action. Kingman vs. Draper, 14 Ill. App. 477; Lloyd vs. Manufacturer&s & Merchant's Warehouse Co., 102 Ill. App. 551; Heenan Mercantile Co. vs. Welter, 144 Ill. App. 279; Bostrom vs. Becker, 172 Ill. App. 410; Falkenan vs. Smedley, 200 Ill. App. 6; Luther vs. Mathis, 211 Ill. App. 296. According to the evidence offered by appellant his claim was based upon a note given by appellee for money loaned. The claim of set-off is based upon profits due appellee resulting from a sale of

upon a note given by appellee for money loaned. The claim of set-off is based upon profits due appellee resulting from a sale of according to the evidence offered by appellant his claim was taxed va. Smedley, 200 Ill. App. 6; Luther va. Watkis, 211 Ill. App. 206. 144 Ill. App. 279; Boston va. Hosier, 172 Ill. App. 410; Parkman Warehouse Co., 108 Ill. App. 321; Mechan Mercantile Co. va. Walter, va. Tarpey, 14 Ill. App. 477; Lloyd va. Manufacturers & Merchants' ceive further than to say that a set-off usually arises out of a completed extinsio to the plaintiff's cause of action. Simpson as applied to the evidence.

The distinction between recoupment and set-off is well understood. The courts of this state, with few exceptions, have never confused or misapplied the principle. Recoupment at most and consequently the verdict is contrary to the law amount of the set-off; that it would be merely a matter of recoupment and therefore there could be no recovery over and above the on and appellee's claim of set-off arise out of the same subject matter and therefore there could be no recovery over and above the item a set-off, but merely shows a recoupment; that the note and

Appellant further contends that the evidence does not establish 272; McGinn va. Williams, 63 Ill. 300; Dege va. Lewis, 59 Ill. 504. Cayser, 76 Ill. 385; Great Western Insurance Co. va. Rose, 89 Ill. note was delivered whether conditionally or otherwise. Mannva. to introduce evidence relative to circumstances under which the note was delivered conditionally. Under this plea appellee had a right

Appellee also filed a plea alleging that the note was delivered unconditionally. Under this plea appellee had a right put the appellant on proof of every material allegation of his

a plea of set-off but he also filed a plea of non-assumpsit which App. 388; Raymond va. Norker, 81 Ill. 381. Appellee not only filed of set-off was the only plea filed. Smith va. Bellgrees, 200 Ill.

plea of set-off which is inconsistent with the evidence as well as the law. This contention would undoubtedly be true if the plea support of the plea of set-off and found for the appellee on his of no avail; that the verdict was based upon evidence offered in the amount due on the note, his evidence contradictory thereto is

that appellee having admitted by his plea of set off that he owed

real estate. There was no connection between the two transactions, if the evidence is to be believed, and they did not grow out of the same transaction. The damages sought to be set off were capable of being ascertained and were the proper subject of set-off.

Appellant next insists that the entire defense was that there was an oral agreement concerning the purchase of the land, the resale of the same and the division of the profits; that the plea alleged and the evidence shows that this agreement was oral; that the agreement related to real estate and was therefore void under the Statute of Frauds. There are two answers to this contention. Appellee's claim was not based upon a contract for the sale of land, but was based upon an agreement to divide profits. The Statute of Frauds has no application to an oral agreement for a division of profits. Where the action is only for the agreed share of the profits, no agreement affecting the title to the lands itself remaining executory, the Statute of Frauds does not apply. Eaton vs. Graham, 104 Ill. App. 296. The other reason is that the contract has been fully executed. Even though a contract is void because of the Statute of Frauds, if it has been executed an action will lie against the party receiving the profits as for money had and received. Pearce vs. Pearce, 184 Ill. 289; Railway Co. vs. Wood, 189 Ill. 352; Booker vs. Wolf, 195 Ill. 365.

The form of the verdict was "We, the jury, find the issues for the plaintiff as to his claim, and also for the defendant under the plea of set-off, and we find a balance due the defendant over and above the plaintiff's claim in the sum of $260.00." Appellant contends that this verdict is inconsistent and conflicting; that if the appellee owed the appellant $669.00 then the appellant did not owe appellee anything, for the reason that the appellee's testimony is that the $600.00 was money due him from appellant as an advancement on the profits, and that the balance of his profits was to be paid after the title to the real estate was cleared. The verdict as returned is in accordance with the instructions of the court and we do not think there can be any misunderstanding as to its meaning.

we do not think there can be any misunderstanding as to its meaning.

as returned is in accordance with the instructions of the court and paid after the title to the real estate was cleared. The verdict

owe appellee anything, for the reason that the appellee's testimony is that the $600.00 was money due him from appellant as an advance-ment on the profits, and that the balance of his profits was to be

above the plaintiff's claim in the sum of $600.00." Appellant contends that this verdict is inconsistent and contradictory; that if the appellee owed the appellant $600.00 then the appellant did not

the plaintiff as to his claim, and also for the defendant under the plea of set-off, and we find a balance due the defendant over and

The form of the verdict was "We, the jury, find the issues for

Farms, 196 Ill. 382; Railway Co. vs. West, 168 Ill. 484; Bonker vs. Wolf, 195 Ill. 368.

receiving the profits on for money had and received. Pearce vs. Truada, if it has been executed an action will lie against the party

executed. Even though a contract is void because of the statute of App. 296. The other reason is that the contract has been fully

the Statute of Frauds does not apply. Bolton vs. Gorham, 104 Ill. Where the action is only for the agreed share of the profits, no agreement affecting the title to the lands itself remaining executory,

has no application to an oral agreement for a division of profits. based upon an agreement to divide profits. The Statute of Frauds

claim was not based upon a contract for the sale of land, but was

ment related to real estate and was therefore void under the Statute of Frauds. There are two answers to this contention. Appellee's

and the evidence shows that this agreement was oral; that the arrange-

of the sons and the division of the profits; that the plan alleged

was an oral agreement concerning the purchase of the land, the resale

Appellant next insists that the entire defense was that there

at being ascertained and were the proper subject of set-off.

the same transaction. The damages sought to be set off were capable

if the evidence is to be believed, and they did not grow out of

real estate. There was no connection between the two transactions,

It simply shows how the jury arrived at their conclusion. The only material part of the verdict is that it found a balance due the appellee over and above the appellant's claim of $260.00. All of the rest of the verdict may be disregarded. The intention is apparent and is not capable of other interpretations.

It is next contended that the court admitted evidence to contradict the note which upon its face was an unqualified promise to pay, and permitted the appellee to testify that the note was not what it purported to be, but was merely an evidence of an advancement, or was a receipt and not a promise to pay; that if the law permits a maker of a note to thus impeach or repudiate his promise, the foundation on which negotiable instruments are supposed to rest has been shattered.

It is undoubtedly the law that the terms of a written contract cannot be varied by the parol agreement of the parties. Robinson vs. Yetter, 238 Ill. 323. Neither can parol evidence be admitted to change or vary the terms of a note which has been executed and delivered. Walters vs. Smith, 23 Ill. 283; Skinner vs. Raschke, 213 Ill. App. 324. Section 9, chapter 98 of the Statutes provides that in any action upon a note, if the consideration upon which it was made has failed in whole or in part, it shall be lawful for the defendant to plead that the consideration has failed, and if it appears from the evidence that the consideration has failed, the verdict should be for the defendant. Section 28 of the same chapter provides that the absence or failure of consideration is a matter of defense against any person not a holder in due course, and that partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise. In Morgan vs. Fallenstein, 27 Ill. 30, the court said: "A note or bond to pay money, is necessarily but a part of the agreement between the parties, leaving out, as it does, all that portion of the agreement which induced the undertaking to pay the money, and if this part could not be shown by parol, there must ever be a liability to a failure of justice." This language is quoted in Ruff vs. Jarrett, 94 Ill. 475, and the defendant was permitted to show a breach of

It simply shows how the jury arrived at their conclusion. The only material part of the verdict is that it found a balance due the appellee over and above the appellant's claim of $850.00. All of the rest of the verdict may be disregarded. The intention is apparent and is not capable of other interpretations.

It is next contended that the court admitted evidence to contradict the note which upon its face was an unqualified promise to pay, and permitted the appellee to testify that the note was not what it purported to be, but was merely an evidence of an advancement, or was a receipt and not a promise to pay; that if the law permits a maker of a note to thus impeach or repudiate his promise, the foundation on which negotiable instruments are supposed to rest has been shattered.

It is undoubtedly the law that the terms of a written contract cannot be varied by the parol agreement of the parties. Robinson va. Yetter, 238 Ill. 253. Neither can parol evidence be admitted to change or vary the terms of a note which has been executed and delivered. Walters va. Smith, 28 Ill. 289; Skinner va. Maguire, 213 Ill. App. 324. Section 9, chapter 98 of the Statutes provides that in any action upon a note, if the consideration upon which it was made has failed in whole or in part, it shall be lawful for the defendant to plead that the consideration has failed, and if it appears from the evidence that the consideration has failed, the verdict should be for the defendant. Section 58 of the same chapter provides that the absence or failure of consideration is a matter of defense against any person not a holder in due course, and that partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise. In Morgan va. Fallenstein, 27 Ill. 30, the court said: "A note or bond to pay money, is necessarily but a part of the agreement between the parties, leaving out, as it does, all that portion of the agreement which induced the undertaking to pay the money, and if this part could not be shown by parol, there must ever be a liability to a failure of justice." This language is quoted in Hall va. Dewolf, 94 Ill. 475, and the defendant was permitted to show a lunacy of

warranty for the property for which the note was given. To the same effect are McClure vs. Williams, 65 Ill. 390; Mann vs. Smyser, 76 Ill. 365; Van Norman vs. Young, 228 Ill. 425. The evidence did not vary the terms of the note, but merely showed the conditions under which it was delivered.

Complaint is made of the fourth, fifth and sixth instructions given on behalf of the appellee, and the eighth and ninth instructions refused on behalf of the appellant. We think the instructions given and refused were in accordance with the law applicable to the facts and no error was committed in any of them.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of Oct. in the year of our Lord one thousand nine hundred and twenty-three.

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 624

BE IT REMEMBERED, that afterwards, to-wit: On DEC 12 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Jacob W. Welty,

appellant,

vs.

Adolph Bursing,

appellee,

Appeal from the Circuit Court of Ogle County

231 I.A. 624

Partlow, P.J.

Appellant, Jacob W. Welty, began an action of replevin against appellee, Adolph Bursing, before a justice of the peace in Ogle county to recover 210 fence posts and 27 loads of pole wood which appellant claimed to own. There was a trial by jury, a verdict in favor of appellant, and an appeal was prosecuted to the circuit court of Ogle county, where there was a trial by jury, verdict in favor of the appellee and this appeal was prosecuted.

The principal ground of reversal urged is that the verdict is contrary to the evidence. The evidence shows that the appellant was the owner of 143 acres of land northwest of the village of Byron in Ogle county. The farm was rented to appellee in 1916 and he occupied it for five years. In the northwest corner of the farm was a tract of land known as the brush tract containing about an acre and a half. It extended about twenty five rods along the west fence and about five rods along the north fence and was of irregular triangular shape. It was covered with brush and on it were a large number of standing trees consisting of crabapple, burr oak, black oak and white pine. East of the brush tract was a clearing or pasture about two rods wide east and west. East of the clearing was a timber tract consisting of mostly burr oak, some hickory and some black oak. The timber tract was about forty rods wide east and west and about sixty rods north and south and contained eighteen or twenty acres. Some of the trees in the timber tract were two feet in thickness and the average was about a foot thick. South of the brush tract was a pasture of two or three acres extending to the timber track.

Jacob W. Wolfy,

appellant,

vs.

Adolph Durning,

appellee.

Appeal from the Circuit Court of Ogle County

Partlow, J.J.

Appellant, Jacob W. Wolfy, began an action of replevin against appellee, Adolph Durning, before a Justice of the Peace in Ogle county to recover 210 fence posts and 27 loads of pole wood which appellant claimed to own. There was a trial by jury, a verdict in favor of appellant, and an appeal was prosecuted to the circuit court of Ogle county, where there was a trial by jury, verdict in favor of the appellee and this appeal was prosecuted.

The principal ground of reversal urged is that the verdict is contrary to the evidence. The evidence shows that the disputed land was the owner of 146 acres of land northwest of the village of Byron in Ogle county. The farm was rented to appellee in 1916 and he occupied it for five years. In the northwest corner of the farm was a tract of land known as the brush tract containing about an acre and a half. It extended about twenty five rods along the west fence and about five rods along the north fence and was of irregular triangular shape. It was covered with brush and on it were a large number of standing trees consisting of crabapple, burr oak, black oak and white pine. Most of the brush tract was a clearing or pasture about two rods wide east and west. Most of the clearing was a timber tract consisting of mostly burr oak, some hickory and some black oak. The timber tract was about forty rods wide east and west and about sixty rods north and south and contained eighteen or twenty acres. Some of the trees in the timber tract were two feet in thickness and the average was about a foot thick. South of the brush tract was a pasture of two or three acres extending to the timber tract.

There was a fence along the south side of the timber tract and of the pasture tract.

In the fall of 1916, appellant made a contract with appellee and his brother, Joseph Bursing, who was then living with appellee, to clear the brush tract for $25.00 and the wood. They commenced at the south end and worked north. They cut about three-fourths of the timber and brush, and in the spring stopped work. The appellant paid them $25.00. There was left on the brush tract uncut about twenty burr oaks, black oaks and white pines.

The appellee contends that shortly after this contract for clearing the brush tract was entered into, appellant requested that they make a change in the contract for the reason that he wanted certain of the timber left standing along a ravine in the brush tract so the banks would not wash. Appellee contends that in place of the timber left standing in the brush tract appellant agreed that appellee should have other timber in the timber tract. Appellant denies that any such change was made in the contract. The timber in question includes timber taken from both tracts. After appellee quit cutting timber in the brush tract in 1917, no more timber was cut for five years except some fire wood.

The controversy which is the basis of this law suit occurred in 1922, just before the appellee moved off of the land on March 1, 1922. Appellee had a sale and sold all his stock. He then turned stock of his neighbors into the pasture. Appellant testified that when he saw this stock in the pasture he told appellee that appellee had no right to turn this stock into the pasture and if appellee would take the stock out appellee could take the wood he did not cut five years before. On cross-examination appellant said he told appellee he could have the wood he did not cut off of the brush tract. The witness Matters testified he heard this conversation between appellee and appellant and appellant told appellee that if appellee would take the cattle out appellee could finish the timber which appellant had given him in the brush tract. Earl Null testified he heard this conversation and appellant

of the pasture tract.

There was a fence along the south side of the timber tract

In the fall of 1916, appellant made a contract with appellee and his brother, Joseph Bruning, who was then living with appellee, to clear the brush tract for $20.00 and two cows. They commenced at the south end and worked north. They cut about three-fourths of the timber and brush, and in the spring stopped work. The appellant paid them $20.00. There was left on the brush tract about twenty-four cords, about one and a half piece.

The appellee contends that shortly after this he agreed for clearing the brush tract was entered into, appellant requested that they make a change in the contract for the reason that, he wanted certain of the timber left standing along a roving in the brush tract so the banks would not wash. Appellee contends that in place of the timber left standing in the brush tract appellant agreed that appellee should move other timber in the timber tract. Appellant denies that any such change was made in the contract. The timber in question includes timber taken from both tracts. After appellee quit cutting timber in the brush tract in 1917, no more timber was cut for five years except some fire wood.

The controversy which is the basis of this law suit occurred in 1922. Just before the appellee moved off of the land on March 1, 1922. Appellee had a sale and sold all the stock. On that morning appellant went to the residence of the appellee to get a burned stock of his returned into the pasture. Appellant testified that when he saw this stock in the pasture he told appellee that appellee had no right to turn this stock into the pasture and if appellee would take the stock out appellee would that the good he did not own five years before. On cross-examination appellant said he told appellee he could have the wood if he let me get off of the brush tract. The witness Hutson testified he heard this conversation between appellee and appellant told appellee that if appellee would take the wood it was could finish the timber which appellant had cut in the brush tract. Earl Hall testified he heard this conversation and appellant

said if appellee would have the stock taken out appellant would let him have the balance of that wood, and appellee replied that rather than have any trouble he would have the stock taken out. Appellee testified that appellant said "You know that wood you were supposed to get. If you don't take the cattle out, I am going to stop you from taking that wood." I said "The wood is worth a whole lot more than the cattle and mules." He said "If you think it is, take your cattle and mules out." I said "I would take them out" and he said "All right." The cattle and mules were taken out and not put back.

Claiming to act upon the conversation in which appellant is alleged to have told appellee he could take the balance of the timber which he had not taken five years before, appellee cut part of the twenty trees left in the brush tract and then went across the clearing and commenced at the south end of the timber tract and cut trees from the south end to the north, a distance of about four rods in width east and west, and sixty rods long north and south. He cut fifty-six trees, mostly burr oak, some of which were two feet in diameter. Some of the trees were large enough to make six posts at the bottom cut and many of the posts could be split into two posts. They were all good solid timber. From these trees the appellee made posts and pole wood which he removed from the farm. These posts and this wood are the subjects of this replevin suit.

The evidence shows that the parties, in the latter part of February, 1922, after this timber had been cut on the timber tract, had a conversation about the wood. The appellant claimed the appellee had taken wood that did not belong to him, but this was disputed by the appellee. Appellant stated that he was going to send Stires, a constable, to appellee. The next day Stires went to see the appellee. The appellant admitted he sent Stires and instructed Stires to settle the matter with appellee if he could, and he admitted that when Stires came back he reported to appellant the result of his conference with appellee. Stires

The evidence shows that the parties, in the latter part of February, 1922, after this timber had been cut on the timber tract, had a conversation about the wood. The appellant claimed the appellee had taken wood that did not belong to him, and this was disputed by the appellee. Appellant stated that he was going to send Sitton, a constable, to appellee. The next day Sitton went to see the appellee. The appellant admitted he sent Sitton and instructed Sitton to settle the matter with appellee if he could, and he admitted that when Sitton came back he reported to appellant the result of his conference with appellee. Sitton said if appellee would have the steer taken out appellant would let him have the balance of that wood, and appellee replied that rather than have any trouble he would have the wood taken out. Appellee testified that appellant said "Let them that need you were supposed to get. If you don't take the cattle out, I am going to stop you from taking that wood." I said "The wood is worth a whole lot more than the cattle and mules." He said "I don think it is, take your cattle and mules out." I said "I would take them out" and he said "All right." The cattle and mules were taken out and not put back.

Claiming to act upon the conversation in which appellant is alleged to have told appellee he would take the balance of the timber which he had not taken five years before, appellee cut part of the twenty trees left in the brush tract and then went across the clearing and commenced at the south end of the timber tract and cut trees from the south end to the north, a distance of about four rods in width east and west, and sixty rods long north and south. He cut fifty-six trees, mostly burr oak, some of which were two feet in diameter. Some of the trees were large enough to make six posts at the bottom cut and many of the posts could be split into two posts. They were all good split timber. From these trees the appellee made posts and pole wood which he removed from the farm. These posts and this wood are the subjects of this replevin suit.

was not called as a witness, but the appellee testified Stires told him that appellant had sent him out to tell appellee that appellee could have the wood, but that he must not take any more posts, and appellee replied that he would not take any more posts, and he did not take any more posts, and the posts replevied were posts which had been taken prior to this conversation, and the wood hauled back was what was given to him by Stires.

Where the evidence is conflicting it is for the jury to weigh the same and determine where the preponderance is, and their finding will not be disturbed by a court of review unless it is manifestly against the weight of the evidence. Greene vs. Mumper, 138 Ill. 434; Green vs. Green, 145 Ill. 264; Marble vs. Marble, 304 Ill. 229. This case has been tried by two juries. The first jury decided in favor of the appellant and the last jury decided against him. It is a controverted question of fact as to just what change, if any, was made in the original contract with reference to the clearing of the brush tract. There is also a conflict as to what was said between the parties at the time the cattle were taken out. There is also a conflict as to whether or not the constable, who was sent out to see the appellee, settled the controversy between the appellant and the appellee. If the evidence of the appellee is to be taken as true, the constable was not only authorized to settle the controversy, but he did settle the controversy by telling the appellee he could take the wood but he should not take any more of the posts. Under this condition of the evidence we do not feel justified in setting aside this verdict on the ground that it is against the weight of the evidence.

One instruction was refused on behalf of the appellant and its refusal is assigned as error. This instruction told the jury thatif they believed the appellant had proven by a preponderance of the evidence, that he was the owner of the land on which the trees were cut, then he had proven prima facie ownership of the posts and wood, and if the appellee claimed ownership the burden of proof was upon him to overcome the prima facie case.

burden of proof was upon him to overcome the prima facie case. the posts and wood, and if the appellee claimed ownership the jury should believe the appellant had proven by a preponderance of the evidence, that he was the owner of the land on which the trees were cut, then he had proven prima facie ownership of the posts and wood, and it was given to him by statute.

Where the evidence is conflicting it is for the jury to weigh the same and determine where the preponderance is, and their finding will not be disturbed by a court of review unless it is manifestly against the weight of the evidence. Greene vs. Kumpe, 104 Ill. 484; Green vs. Green, 140 Ill. 604; Castle vs. Castle, 204 Ill. 289. This case has been tried by two juries. The first jury decided in favor of the appellant and the last jury decided against him. It is a controverted question of fact as to just what change, if any, was made in the original contract with reference to the clearing of the brush tract. There is also a conflict as to what was said between the parties at the time the cattle were taken out. There is also a conflict as to whether or not the constable, who was sent out to see the appellee, settled the controversy between the appellant and the appellee. If the evidence of the appellee is to be taken as true, the constable was not only authorized to settle the controversy, but he did settle the controversy by telling the appellee he could take the wood but he should not take any more of the posts. Under this condition of the evidence we do not feel justified in setting aside this verdict on the ground that it is against the weight of the evidence.

The instruction was refused on behalf of the appellant and like refused in modified as error. This instruction told the jury that if they believed the appellant had proven by a preponderance of the evidence, that he was the owner of the land on which the posts which had been taken prior to this conversation, and the wood hauled back was what was given to him by Estes.

told him that appellant had sent him out to tell appellee that appellee could have the wood, but that he must not take any more posts, and appellee replied that he would not take any more posts, and he did not take any more posts, and the posts replaced were not called as a witness, but the appellee testified Estes

The court instructed the jury at the request of the appellee that the burden of proof was upon the appellant. The appellant cannot be heard to say that this instruction was not correct, because in appellant's first two given instructions that same rule of law was recognized as correct. In a replevin suit the burden is upon the plaintiff, he must show by a preponderance of the evidence his general or special property in the goods replevied at the time of the commencement of the suit. Pease vs. Ditto, 189 Ill. 456; Perkins vs. Knicely, 204 Ill. 275. The question in this case was not limited to the ownership of the land but the question at issue was as to the ownership and the right to the possession of the posts and poles. We think the refusal of the instruction was not reversible error.

On cross-examination the appellee was asked as to the value of some of the trees in the brush tract which he was to take under his contract. An objection was sustained and this ruling is assigned as error. The appellee had not testified to the value of any of the property, and therefore the question was not proper cross-examination. The value of these trees was not material in the case. This was an action of replevin. The goods had been replevied and were in the possession of the appellee. The appellant had closed his case and had made no proof as to the value of the timber and its value could throw no light upon the ownership of the wood. On cross-examination the appellee was asked where this wood was taken, and an objection was sustained to the question. Under the issues the question was not material and the objection was properly sustained.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

We find no reversible error and the judgment will be affirmed.

The judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 21st day of Sept. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

R. A. denied Oct. 17, 1923

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 624

BE IT REMEMBERED, that afterwards, to-wit: On 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Almeda Peterson,

appellee,

vs.

Andrew Anderson,

appellant,

Appeal from the Circuit Court
of Knox County

Partlow, P. J.

231 A. 624

Appellee, Almeda Peterson, began suit before a justice of the peace in Knox county against appellant, Andrew Anderson, to recover for room rent, washing, meals and labor. There was a judgment in favor of the appellant in the justice court and an appeal was prosecuted to the circuit court of Knox County, where there was a trial by jury, verdict for appellee for $63.50, and a further appeal to this court.

The appellee testified that the appellant was indebted to her for about one hundred meals between May 28, 1918, and December 11, 1918 of the value of $75; for washing on May 29, 1918, $2.00; washing for five months from June 1, 1918, at $3.00 per month, $15.00; for cleaning rooms three times between July 1, 1918, and December 15, 1918, at $2.00, $6.00; for care of rooms from May 18, to September 15, 1919, $30.00; for room rent from September 19, 1918, to December 15, 1919, $36.00.

The evidence shows that appellant was the owner of nine acres of land on which was located a house where he resided with his wife. The wife died, and on May 28, 1918, a contract of sale for the premises was entered into with John E. Peterson, husband of the appellee. Peterson also purchased certain articles of personal property from the appellant. The title to the real property could not be secured by Peterson until after a master's sale, and the deed was not delivered to Peterson until September 6, 1919. Immediately upon making the contract, Peterson and his family moved into the house. Appellant retained two rooms in the house from the date of the contract until the deed was made. From May, 1918, until about July, 1918, the

Almeda Peterson,

appellee,

vs.

Andrew Anderson,

appellant,

Appeal from the Circuit Court
of Knox County

Bartlow, P. 1.

Appellee, Almeda Peterson, began suit before a justice of the peace in Knox county against appellant, Andrew Anderson, to recover for room rent, washing, meals and labor. There was a judgment in favor of the appellant in the justice court and an appeal was prosecuted to the circuit court of Knox County, where there was a trial by jury, verdict for appellee for $63.30, and a further appeal to this court.

The appellee testified that the appellant was indebted to her for about one hundred meals between May 28, 1918, and December 11, 1918 of the value of $75; for washing on May 29, 1918, $2.00; washing for five months from June 1, 1918, at $2.00 per month, $10.00; for cleaning rooms three times between July 1, 1918, and December 15, 1918, at $2.00, $6.00; for care of rooms from May 18, to September 15, 1919, $30.00; for room rent from September 19, 1918, to December 15, 1918, $36.00.

The evidence shows that appellant was the owner of nine acres of land on which was located a house where he resided with his wife. The wife died, and on May 28, 1918, a contract of sale for the premises was entered into with John E. Peterson, husband of the appellee. Peterson also purchased certain articles of personal property from the appellant. The title to the real property could not be secured by Peterson until after a master's sale, and the deed was not delivered to Peterson until September 6, 1919. Immediately upon making the contract, Peterson and his family moved into the house. Appellant retained two rooms in the house from the date of the contract until the deed was made. From May, 1918, until about July, 1918, the

appellant worked for Peterson. During the remainder of the time he worked for various persons in the neighborhood but retained his rooms at Peterson's home. He generally took his Sunday dinner at Peterson's house, and admits there were about one hundred of them. The appellee took care of his room and did his washings on various occasions as testified to by her. Appellant claims that under his contract of hiring, while working for Peterson, he was not to pay for his washing; that Peterson was not entitled to possession of the house under the contract until the trade was completed, and appellee with her husband occupied the premises without any right until the balance of the purchase price was paid; that Peterson was the head of the family and appellee had no right to anything furnished the appellant as it was all done in and about the business of her husband; that he made no agreement with appellee to pay her any money and that whatever she did was in discharge of her duties as the wife of Peterson who was the controlling force in the household; that if the claim of appellee is held valid then she is liable to him for $180 for rent of the premises which would more than set off her claim.

Even conceding that the appellant occupied the two rooms as owner and was not liable for the rent, that does not dispose of the various other items of claim which appellee had against the appellant. Appellee was under no legal liability to do his washing, clean his rooms and furnish meals. The items for washing and care for the rooms amount to $53 which is withint $10.50 of the amount of this judgment, and under the evidence the judgment is valid and binding to that extent regardless of all other questions in the case. It is admitted by the appellant that he received almost one hundred meals and the appellee testified that he was indebted to her for those meals. Regardless of the relation between appellee and her husband the evidence shows that she had the right to recover for the meals furnished at least to the extent of $10.50. The appellant claims he would be entitled to a set off for the rent but our attention is not called to any evidence in the abstract where any such set off was claimed by the appellant.

We conclude that the evidence sustains the judgment and it will be affirmed. Judgment affirmed.

appellant worked for Peterson. During the remainder of the time he worked for various persons in the neighborhood but retained his rooms at Peterson's home. He generally took his Sunday dinner at Peterson's home, and admits there were about one hundred of them. The appellee took care of his room and did his washings on various occasions as testified to by her. Appellant claims that under his contract of hiring, while working for Peterson, he was not to pay for his washing; that Peterson was not entitled to possession of the house under the contract until the trade was completed, and appellee with her husband occupied the premises without any right until the balance of the purchase price was paid; that Peterson was the head of the family and appellee had no right to anything furnished the appellant as it was all done in and about the business of her husband; that he made no agreement with appellee to pay her any money and that whatever she did was in discharge of her duties as the wife of Peterson who was the controlling force in the household; that if the claim of appellee is held valid then she is liable to him for $180 for rent of the premises which would more than set off her claim.

Even conceding that the appellant occupied the two rooms as owner and was not liable for the rent, that does not dispose of the various other items of claim which appellee had against the appellant. Appellee was under no legal liability to do his washing, clean his rooms and furnish meals. The items for washing and care for the rooms amount to $83 which is within $10.80 of the amount of this judgment, and under the evidence the judgment is valid and binding to that extent regardless of all other questions in the case. It is admitted by the appellant that he received almost one hundred meals and the appellee testified that he was indebted to her for those meals. Regardless of the relation between appellee and her husband the evidence shows that she had the right to recover for the meals furnished at least to the extent of $10.80. The appellant claims he would be entitled to a set off for the rent but our attention is not called to any evidence in the abstract where any such set off was claimed by the appellant.

We conclude that the evidence sustains the judgment and it will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of Oct. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7238

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 624

BE IT REMEMBERED, that afterwards, to-wit: On AUG 12 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Carl Crane,

appellant,

vs.

James T. Wheeler, as sheriff of Knox County,

appellee,

Appeal from the circuit court of Knox County

231 A. 624

Partlow, P.J.

The appellant, Carl Crane, began an action of replevin in the circuit court of Knox county against appellee, James T. Wheeler, as sheriff of Knox County, to recover possession of an automobile which appellant claimed to own. There was a trial by jury, verdict in favor of appellee and this appeal was prosecuted.

The evidence shows that from 1916 to January 1, 1922, appellant was engaged in the automobile business in the City of Galesburg. During a part of this time the business was carried on under the firm name of Crane & McKenzie, but appellant testified he was the owner of the business and that McKenzie was merely employed by him. In July, 1921, appellant was agent for the Haynes automobile and during that month purchased the automobile in question for $1539.37, but the transaction was in the name of the firm as was also the dealer's license. Appellant testified that in December, 1921, this machine was worth $1915.00. On December 28, 1921, a written agreement was entered into between appellant and Edmund O. Dayton, by the terms of which the appellant leased the automobile to Dayton for twelve months at $100.00 per month. The machine was delivered to Dayton during the latter part of December, 1921, and he kept it at the Mackemer Motor Car Company's garage in Galesburg, where it remained until it was attached. On January 21, 1922, Dayton made application for a license for this machine. The application was made in the name of W. B. Dayton, who was a son of Edmund O. Dayton, but the application was made and signed by Edmund O. Dayton. On April 28, 1922, an attachment writ in favor of Alice G. Dayton, a

Carl Crane,

Appellant,

vs.

James T. Wheeler, as sheriff of Knox County,

Appellee,

Appeal from the circuit court of Knox County

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The evidence shows that from 1918 to January 1, 1932, appellant was engaged in the automobile business in the City of Galesburg. During a part of this time the business was carried on under the firm name of Crane & McKenzie, but appellant testified he was the owner of the business and that McKenzie was merely employed by him. In July, 1931, appellant was agent for the Haynes automobile and during that month purchased the automobile in question for $1539.37, but the transaction was in the name of the firm as was also the dealer's license. Appellant testified that in December, 1931, this machine was worth $1815.00. On December 28, 1931, a written agreement was entered into between appellant and Edmund O. Dayton, by the terms of which the appellant leased the automobile to Dayton for twelve months at $100.00 per month. The machine was delivered to Dayton during the latter part of December, 1931, and he kept it at the Mackemer Motor Car Company's garage in Galesburg, where it remained until it was attached. On January 31, 1932, Dayton made application for a license for this machine. The application was made in the name of W. B. Dayton, who was a son of Edmund O. Dayton, but the application was made and signed by Edmund O. Dayton. On April 28, 1932, an attachment writ in favor of Alice G. Dayton, a

former wife of Edmund O. Dayton, was levied upon this machine and it was taken possession of by appellee. On May 1, 1922, the appellant made two sworn tax schedules, one in the name of Crane & McKenzie and the other in his own name, in neither of which he listed for taxation the car in question. On May 8, 1922, an execution against Edmund O. Dayton in favor of Frances C. Necasek, a daughter of Dayton, was levied upon this car by the appellee. On the same day the appellant made affidavit for a writ of replevin in the circuit court of Knox county, Illinois, but the affidavit was not filed until May 25, 1922. Before suing out the writ of replevin and after the attachment writ was issued but before the execution was levied, the appellant made a demand on the sheriff for the car.

The first question for determination is whether the transaction between appellant and Dayton was in fact a sale as was found by the jury or was a leasing as contended by appellant. The evidence shows that on the date the written agreement was entered into the automobile was the property of appellant. He had a right to do with it as he saw fit. If he desired to lease it to Dayton he had a right to do so. No law was violated by such leasing. The written instrument entered into by its terms and upon its face must be held to be a lease and not a sale. The question is whether the other facts appearing in evidence were sufficient to make it a sale and not a lease. There is no evidence that appellant knew Dayton was indebted to his daughter and former wife, or that he had any purpose in covering up the real title to the automobile. It is true there are some peculiar and suspicious circumstances attending the transaction. The license was taken out in the name of Dayton's son, but there is no evidence that appellant was a party to this transaction or that he knew anything about it. If the written agreement between appellant and Dayton was in fact a lease, then the fact that Dayton without the knowledge or consent of appellant took out a license in the name of the son would not be sufficient to deprive appellant of his title. Neither should appellant be deprived of his title because he and Dayton had been or were engaged

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the fact that Dayton without the knowledge or consent of appellant
took out a license in the name of the son would not be sufficient
to deprive appellant of his title. Neither should appellant be

in business together, and that Dayton took the car to Kentucky after it was replevined where it has remained since that time. Practically the only other evidence which could possibly justify the verdict is that appellant did not schedule the car for taxation in his own name. At the time this tax schedule was filed the car was in the possession of the sheriff under the attachment writ. At that time its title was in controversy and appellant might have had some ground for uncertainty as to who would finally be adjudged to be the owner. This may have had some influence upon him in failing to schedule it for taxation. Even if there had been no doubt in his mind as to the ownership, the mere failure to schedule it for taxation would not be sufficient to deprive him of his ownership. After carefully considering all of the evidence we are of the opinion that the finding of the jury that the appellant was not the owner is not sustained by the evidence.

It is urged at considerable length that replevin is a possessory action and that appellant was not entitled to the possession of the car at the time the suit was commenced. Section 1 of the Replevin Act provides that replevin may be brought by the owner or person entitled to the possession. The affidavit for replevin alleged that appellant was the owner and entitled to the possession. If he was the owner he was not entitled to the possession as against Dayton for the reason that the lease was still in full force and effect. Appellant's right to possession as against Dayton was not the test of his right to maintain replevin. If he was the owner and his property had been wrongfully taken by appellee in payment of a debt due from Dayton, he had a right and it was his duty to protect his title against unlawful sale. The attachment writ and the execution were not levied upon the leasehold interest of Dayton but the levy was made upon the theory that Dayton was the owner. Under these circumstances if appellant was the owner he was also entitled to the possession as against appellee. If appellant was the owner and was not entitled to the immediate possession as against Dayton, the final judgment was not entered until after the lease had expired

final judgment was not entered until after the lease had expired and that appellant was not entitled to immediate possession as against Dayton. If appellant was the owner and was in the possession of the aircraft under the attachment writ. At that time its title was in controversy and appellant might have had some ground for uncertainty as to who would finally be adjudged to be the owner. This may have had some influence upon him in failing to schedule it for taxation. Even if there had been no doubt in his mind as to the ownership, the mere failure to schedule it for taxation would not be sufficient to deprive him of his ownership. After carefully considering all of the evidence we are of the opinion that the finding of the jury that the appellant was not the owner is not sustained by the evidence.

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and under Section 23 of the Replevin Act, appellant was entitled to judgment for possession and the court should have assessed the costs against him. Farrell v. Hanchett, 130 Ill. 573.

Complaint is made as to the demand and as to certain instructions. We think the demand was sufficient to justify the replevin. The principal objection to the instructions is that there was injected into the case the question of possession when the real question was merely a matter of ownership. The objections to the instructions are of a general nature and we do not feel called upon to consider each in detail. We think that both the ownership and the right of possession were at issue.

For the errors indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

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Reversed and remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 21st day of Sept. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A.

BE IT REMEMBERED, that afterwards, to-wit: On AUG 13 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Dorothy Grimm,
Defendant in error,
vs. Error to Circuit Court
Henry Grimm, of Kane County.
Plaintiff in error,

Jett, J. 231 I.A. 624

The defendant in error filed her bill in the Circuit Court of Kane County against the plaintiff in error, for a divorce on the ground of habitual drunkenness. The plaintiff in error filed an answer to the bill, in which he denied the charge. There was a hearing and a decree for divorce was rendered against the plaintiff in error, dissolving the marriage, awarding the custody of the six year old child to the defendant in error, and ordering the plaintiff in error to pay alimony at the rate of $50.00 per month. The plaintiff in error paid alimony for a time and then ceased making payments. A petition was filed in the Circuit Court, on failure of plaintiff in error to comply with the terms of the decree, calling upon him to show cause, if any he had, why he should not be held guilty of contempt of court. A hearing was had upon such petition and the plaintiff in error was adjudged to be in contempt of court. From the order holding him in contempt of court an appeal was prosecuted to this court, where the order was affirmed. Grimm v. Grimm, 222 Ill. App. 664.

The cause then was taken to the Supreme Court, where the order was again affirmed. Grimm v. Grimm, 302 Ill. 511.

The plaintiff in error has now sued out a writ of error from this court for the purpose of reviewing the decree of divorce as originally entered. There is but one ground of reversal urged, namely, that the recitals in the decree are not sufficient to sustain the charge of habitual drunkenness, as alleged in the bill, and that the evidence taken in support of the decree is not preserved by a bill of exceptions.

Dorothy Grimm,

Defendant in error,

vs. Error to Circuit Court

Henry Grimm, of Lake County.

Plaintiff in error,

Mr. Justice Dietzen delivered the opinion of the court:

The defendant in error filed her bill in the Circuit Court of Lake County against the plaintiff in error, for a divorce on the ground of habitual drunkenness. The plaintiff in error filed an answer to the bill, in which he denied the charge. There was a hearing and a decree for divorce was rendered against the plaintiff in error, dissolving the marriage, awarding the custody of the six year old child to the defendant in error, and ordering the plaintiff in error to pay alimony at the rate of $30.00 per month. The plaintiff in error paid alimony for a time and then ceased making payments. A petition was filed in the Circuit Court, on failure of plaintiff in error to comply with the terms of the decree, calling upon him to show cause, if any he had, why he should not be held guilty of contempt of court. A hearing was had upon such petition and the plaintiff in error was adjudged to be in contempt of court. From the order holding him in contempt of court an appeal was prosecuted to this court, where the order was affirmed. Grimm v. Grimm, 322 Ill. App. 664.

The cause then was taken to the Supreme Court, where the order was again affirmed. Grimm v. Grimm, 392 Ill. 511.

The plaintiff in error has now sued out a writ of error from this court for the purpose of reviewing the decree of divorce as originally entered. There is but one ground of reversal urged, namely, that the recitals in the decree are not sufficient to sustain the charge of habitual drunkenness, as alleged in the bill, and that the evidence taken in support of the decree is not preserved by a bill of exceptions.

The abstract of record in this cause sets out the original bill for divorce, the answer filed thereto, and the decree rendered thereon; the petition for citation by defendant in error; the answer of plaintiff in error to the petition for citation; the order of the court finding the plaintiff in error guilty of contempt for failure to pay alimony, as provided in the decreefor divorce; together with the oral testimony of defendant in error and plaintiff in error, offered on the hearing of the contempt proceedings; also a decree, rendered in favor of defendant in error against his former wife, for divorce which was obtained by him some eight or nine months before he married defendant in error.

The bill for divorce filed by defendant in error against plaintiff in error alleged complainant and Henry Grimm were "lawfully married January 3, 1912, at Crown Point, Indiana", and lived and cohabited as husband and wife until January 27, 1919; that as the issue of the marriage they had a daughter, six years old; that defendant was guilty of habitual drunkenness for more than two years; that while intoxicated he quarrelled with and ill-treated his family and made life so intolerable to complainant that she was compelled to take their child and leave his home. Defendant answered, admitting he and complainant were "lawfully married" January 3, 1912, and lived together until January 27, 1919. The answer denied the charges of drunkenness and bad treatment.

In the answer of plaintiff in error to the petition for citation filed by defendant in error, plaintiff in error, among other things in his said answer to the petition for citation, stated that he was on the fifth day of February, 1908, married to one Martha Klier; that on the 29th day of April, 1911, he filed a bill for divorce from his said first wife, Martha Grimm, and on the 30th day of May, 1911, he was granted a divorce from his said wife, and the decree is set out in the abstract in this cause. That on the 3rd day of January, 1912, the said plaintiff in error and defendant in error went to the City of Crown Point, Lake County, Indiana

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The bill for divorce filed by defendant in error against plaintiff in error alleged complainant and Henry Grimm were "lawfully married January 5, 1912, at Crown Point, Indiana", and lived and cohabited as husband and wife until January 27, 1919; that as the issue of the marriage they had a daughter, six years old; that defendant was guilty of habitual drunkenness for more than two years; that while intoxicated he quarrelled with and ill-treated his family and made life so intolerable to complainant that she was compelled to take their child and leave his home. Defendant answered, admitting he and complainant were "lawfully married" January 5, 1912, and lived together until January 27, 1919. The answer denied the charges of drunkenness and bad treatment.

In the answer of plaintiff in error to the petition for citation filed by defendant in error, plaintiff in error, among other things in his said answer to the petition for citation, stated that he was on the fifth day of February, 1909, married to one Martha Miller; that on the 29th day of April, 1911, he filed a bill for divorce from his said first wife, Martha Grimm, and on the 26th day of May, 1911, he was granted a divorce from his said wife, and the decree is set out in the abstract in this cause. That on the 3rd day of January, 1912, the said plaintiff in error and defendant in error went to the City of Crown Point, Lake County, Indiana

and were married; that on and for a long time prior to the 3rd day of January, 1912, and for many years since said last date, the said Dorothy Grimm, defendant in error, was and has been a resident of the State of Illinois; that the plaintiff in error, prior to, on, and for many years subsequent to the 3rd day of January, 1912, had been and still was a resident of the State of Illinois; that immediately after said marriage the said plaintiff in error and defendant in error returned to their home in Illinois.

The evidence of the respective parties to this litigation that was heard in open court in the contempt proceedings appears in the abstract, and among other things the plaintiff in error testified: "I am living with my mother and my wife in Aurora, Illinois. I was married on the 24th day of November, 1920. I waited until a year was up. I was married in Aurora, Illinois. This is my wife who is sitting here in the court room". In view of all that is disclosed in this record, is the plaintiff in error in a position to insist that the decree obtained by defendant in error against him should be set aside and vacated and held for naught? It will be remembered that the plaintiff in error, in answering the bill of the defendant in error, admitted that they were "lawfully married January 3, 1912", and lived together until January 27, 1919, and one child was born to them.

By reason of the facts as they appear in this record, we are of the opinion plaintiff in error has so conducted himself that he is not in a position to attack the decree. In the case of Stevens vs. Stevens, 51 Indiana, 542, the husband, after having obtained a decree for divorce, married again and was living with the woman to whom he was last married, as his wife. In a controversy with the previous wife, he asked the court to determine whether or not she had been legally and properly divorced from him. The court refused to consider that question, and in so doing, among other things, said; "By his marriage after his divorce, in contemplation of law, he admitted that he was legally divorced from his

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The evidence of the respective parties to this litigation
in error and defendant in error returned to their home in Illinois.
Illinois; that immediately after said marriage the said plaintiff
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prior to, on, and for many years subsequent to the 3rd day of
resident of the State of Illinois; that the plaintiff in error,
the said Dorothy Grimm, defendant in error, was and has been a
day of January, 1918, and for many years since said last date,
and were married; that on and for a long time prior to the 3rd

former wife". In the case at bar, plaintiff in error by his marriage after being divorced by his wife, in contemplation of law, admitted the legality of the decree. Garner v. Garner, 38 Indiana, 139; Stephens vs. Stephens, supra.

As heretofore stated, the contempt proceedings between these same parties was reviewed by the Supreme Court. Grimm v. Grimm, supra.

This fact is admitted in the briefs and arguments filed herein. What was said by the court of last resort in reviewing the contempt proceedings sheds much light on the question involved on this hearing. At pages 513 and 514, the Supreme Court said; "The matter here relied on as rendering the decree void for want of jurisdiction, does not appear from an inspection of the record. Indeed, by his answer, defendant himself admitted the validity of the marriage and the jurisdiction of the court to render the decree. If the matter now relied on is true, it was within the knowledge of the defendant, and he deliberately perpetrated a fraud on the court by concealing it. He cannot now be permitted to raise a question of the court's jurisdiction of the subject matter because he desires to avoid complying with the decree. He had the opportunity to present the question in the divorce proceeding which he now raises, and in addition to the general rule above referred to is now estopped to set up that matter in a collateral attack". (Morrill vs. Morrill, 23 A.S.R. 95). In the Morrill case, the Oregon Supreme Court aptly said; "There must be an end to litigation, and where a party has an opportunity to present his defense and neglects to do so, the demands of the law require that he should take the consequences when the judgment or decree is sought to be enforced against him in a collateral proceeding." Grimm also acquiesced in the decree and recognized its validity by paying part of the alimony he was ordered to pay. According to his own statement he has again married since the divorce decree was entered, but he

former wife". In the case at bar, plaintiff in error by his marriage after being divorced by his wife, in contemplation of law, admitted the legality of the decree. Garner v. Warner, 38 Indiana, 159; Stephens vs. Stephens, supra.

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waited a year after that decree was rendered before marrying again. He is now estopped in this proceeding to deny the jurisdiction of the court to render the decree. Denver City Irrigation and Water Co. vs. Middaugh, 13 A.S.R. 234; Greene vs. Greene, 61 Am. Dec. 454, and note on page 465.

We here have a proceeding in which plaintiff in error admitted that he was lawfully married to defendant in error; one in which plaintiff in error acquiesced in the decree and recognized its validity by paying part of the alimony he was ordered to pay; and according to the testimony and admission of plaintiff in error he has again married since the divorce decree was entered, but waited a year after that decree was rendered before marrying again.

In view of the disclosures and admissions found in this record, we are of the opinion that the plaintiff in error is estopped to question the validity of the decree involved in this cause. We are not unmindful of the fact that the decree is very loosely drawn; that the findings therein are largely conclusions. Yet, notwithstanding such is the case, the decree has been recognized by the plaintiff in error by his complying in part with its terms, and this, together with his subsequent conduct, leads us to the conclusion that the said plaintiff in error is in no position to now complain of the decree. The decree of the Circuit Court is therefore affirmed.

Decree affirmed.

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Am. Dec. 456, and note on page 458.

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of the court to render the decree. Power duly invigilation and He is now estopped in this proceeding to deny the jurisdiction

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STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 31st day of Sept in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Rudolph C. Ficken,
Surviving Partner, etc.,
appellant,

vs.

Sarah M. Tallyn, et al,
Executors of the Estate of
Edwin M. Tallyn, deceased.
appellees,

Appeal from the Circuit Court
of Woodford County

231 I.A. 63

Jett, J.

On January 26, 1916, Rudolph C. Ficken and Theodore Ficken, partners, doing business under the firm name of the Farmer's Bank of Benson, the original plaintiff herein, took judgment in the Circuit Court of Woodford County, in vacation, against E. M. Tallyn, the original defendant, for $7875.58, on two judgment notes, one for $3000.00, dated September 25th, 1914, due March 25, 1915, and one for $3750.00 dated December 25th, and due June 24, 1915. The said amount of $7875.58 represented principal, interest and attorney's fees on the notes. The notes contained the usual power of attorney, authorizing the confession of judgment.

On January 31, 1916, Tallyn filed his motion to open up the judgment and for leave to plead. On hearing, the motion to open up the judgment and for leave to plead was granted. A number of pleas were filed. Much delay it appears, was had in making up the issues. Before issue was joined Theodore Ficken, one of the original plaintiffs, and E. M. Tallyn, the original defendant, departed this life. The death of each was suggested, and the surviving partner was substituted as plaintiff, and the executors of the estate of E. M. Tallyn, deceased, were substituted as defendants. The pleas filed and on which the cause was tried, were the general issue, payment, failure of consideration and pleas to the effect that the original defendant, E. M. Tallyn had given a note for $6750.00 upon an agreement and arrangement between himself and the original plaintiffs, that they should take and hold the note, and in case Tallyn should be compelled to pay, or should pay any money because of a certain

Rudolph C. Ticken,

Surviving Partner, etc.,

appellant,

vs. Appeal from the Circuit Court

Sarah M. Tally, et al, of Woodford County

Executors of the Estate of

Edwin M. Tally, deceased.

appellees.

Tett, J.

On January 26, 1916, Rudolph C. Ticken and Theodore Ticken, partners, doing business under the firm name of the Farmer's Bank of Benson, the original plaintiff herein, took judgment in the Circuit Court of Woodford County, in vacation, against E. M. Tally, the original defendant, for $7875.56, on two judgment notes, one for $3000.00, dated September 25th, 1914, due March 25, 1915, and one for $3750.00 dated December 25th, and due June 24, 1915. The said amount of $7875.56 represented principal, interest and attorney's fees on the notes. The notes contained the usual power of attorney, authorizing the confession of judgment.

On January 31, 1916, Tally filed his motion to open up the judgment and for leave to plead. On hearing, the motion to open up the judgment and for leave to plead was granted. A number of pleas were filed. Much delay it appears, was had in making up the issues. Before issue was joined Theodore Ticken, one of the original plaintiffs, and E. M. Tally, the original defendant, departed this life. The death of each was suggested, and the surviving partner was substituted as plaintiff, and the executors of the estate of E. M. Tally, deceased, were substituted as defendants. The pleas filed and on which the cause was tried, were the General issue, payment, failure of consideration and pleas to the effect that the original defendant, E. M. Tally had given a note for $7750.00 upon an agreement and arrangement between himself and the original plaintiffs, that they should take and hold the note, and in case Tally should be compelled to pay, or should pay any money because of certain

$6600.00 note upon which judgment had been entered in Chicago, or if the said Tallyn should satisfy or cause the release and discharge of the said $6600.00 note then the $6750.00 note was not to be collected or paid.

Also a plea called the seventh original plea, in which the entire history of all the transactions of E. M. Tallyn, the South Bend Assurance Company of South Bend, Indiana, its agent with the appellant and his brother, are set forth, and charging that Tallyn had been cheated and defrauded in the transactions.

Replications were filed to the respective pleas and trial had in which the issues were submitted to a jury. The jury found for appellee. A motion for a new trial was denied and judgment rendered on the verdict of the jury against appellant for costs and this appeal followed.

It appears that during the years 1913 and 1914 the original plaintiffs, Rudolph C. Ficken and Theodore Ficken, who were brothers, were conducting a private bank at Benson, Woodford County, Illinois, as partners under the firm name of the Farmer's Bank of Benson. E. M. Tallyn, the original defendant, was a farmer residing only a few miles from Benson. The said original plaintiffs, being the holders of the two said notes and the same being past due, judgment was entered thereon as hereinbefore indicated. The fact that the notes were executed by E. M. Tallyn was not contradicted in any way.

On the trial appellant introduced in evidence the two notes declared upon, which were admitted, and upon the introduction and admission of the two said notes upon which the appellant relied for a recovery he rested his case.

Thereupon, appellees called DeWitte Tallyn, who is a son of E. M. Tallyn, the original defendant in this cause, and he was permitted to testify over the objection of appellant, and his testimony was substantially as follows: That on May 8, 1913, one T. D. McCarthy, agent for the South Bend Assurance Company, of South Bend, Indiana, came to the home of E. M. Tallyn and sold him, the said E. M. Tallyn, 100 shares of stock at $30.00 a share, Tallyn giving

E. M. Tallyn, 100 shares of stock at $30.00 a share, Tallyn giving Indiana, came to the home of E. M. Tallyn and told him, the said McCarthy, agent for the South Bend Assurance Company, of South Bend, money was substantially as follows: That on May 8, 1913, one T. D. permitted to testify over the objection of appellant, and his testi-

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of the two said notes and the same being past due, judgment was Tallyn, the original defendant, was a farmer residing only a few miles from Benson. The said original plaintiffs, being the holders as partners under the firm name of the Farmer's Bank of Benson. E. M. were conducting a private bank at Benson, Woodford County, Illinois, plaintiffs, Hudolph C. Fluken and Theodore Fluken, who were brothers,

It appears that during the years 1913 and 1914 the original on the verdict of the jury against appellant for costs and this appeal followed.

Motions for a new trial were filed to the respective pleas and trial had in which the issues were submitted to a jury. The jury found for appellee. A motion for a new trial was denied and judgment rendered

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of the said $6800.00 note then the $6750.00 note was not to be

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$6800.00 note upon which judgment had been entered in Chicago, of

a note in payment for the stock.

The note was for $3000.00, payable 12 months after date, with interest at the rate of 5 per cent, payable to the Farmer's Bank; Tallyn redeived the stock in the form of a stock certificate; the certificate bore date May 12, 1913, and recited that the company had a capital stock of $100,000.00, that E. M. Tallyn was the owner of 100 shares of the stock and that it was paid up and non-assessable; and the witness further testified about a week later, on May 16, 1913, at the home of Tallyn, McCarthy sold him another 100 shares of the stock, Tallyn, giving a note in the sum of $3000.00 payable 12 months after date, to the Farmer's Bank, and to bear interest at 6 per cent, in payment for the stock; that Tallyn received a certificate for this stock containing the same recitals as in the former certificate; said witness also testified that the notes were renewed from time to time, and were finally paid to the Farmer's Bank at Benson, on March 1, 1915, by Tallyn, the maker of the notes.

If it be true, as testified to by said witness, that the stock was purchased, and the notes were executed and were paid, we are unable to see how it could be material for this proof to go to the jury in this proceeding in which appellant is seeking to recover upon the notes in controversy. The reason why this testimony could be heard, if at all, would be with a view of showing what the relations were between appellant, his deceased brother, and McCarthy. If the testimony of this witness was admitted even for that purpose, the jury should have been informed of the purpose for which the testimony was heard. This testimony, without being limited to the purpose for which it was introduced, was calculated to prejudice the rights of appellant in view of what is subsequently disclosed in this record.

Appellees were also allowed to show over the objection of appellant by the said DeWitte Tallyn, that the said McCarthy sold E. M. Tallyn, his father, 330 shares of stock in the said South Bend Life Assurance Company on or about June 27, 1913; that his

Land Title Assurance Company on or about June 27, 1913, that his
E. M. Tally, his father, 250 shares of stock in the said South
appellant by the said DeWitte Tally, that the said McCarthy sold
limited to the purpose for which it was introduced, was ordinarily
to prejudice the rights of appellant in view of what is subsequently
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The note was for $3000.00, payable 12 months after date, with interest at the rate of 5 per cent, payable to the Farmer's Bank; Tally received the stock in the form of a stock certificate; the certificate bore date May 13, 1913, and recited that the company had a capital stock of $100,000.00, that E. M. Tally was the owner of 100 shares of the stock and that it was paid up and nonassessable; and the witness further testified about a week later, on May 16, 1913, at the home of Tally, McCarthy sold him another 100 shares of the stock, Tally, giving a note in the sum of $3000.00 payable 12 months after date, to the Farmer's Bank, and to bear interest at 6 per cent, in payment for the stock; that Tally received a certificate for this stock containing the same recitals as in the former certificate; said witness also testified that the notes were renewed from time to time, and were finally paid to the Farmer's Bank at Denson, on March 1, 1913, by Tally, the maker of the notes.

If it be true, as testified to by said witness, that the stock was purchased, and the notes were executed and were paid, we are unable to see how it could be material for this proof to go to the jury in this proceeding in which appellant is seeking to recover upon the notes in controversy. The reason why this testimony could be heard, if at all, would be with a view of showing what the relations were between appellant, his deceased brother, and McCarthy. If the testimony of this witness was admitted even for that purpose, the jury should have been informed of the purpose for which the testimony was heard. This testimony, without being

father gave a note in the sum of $6600.00 for the said shares of stock; that the note bore date June 27, 1913, and was delivered to McCarthy, agent for the Assurance Company; that on one of the visits McCarthy produced a letter purporting to be signed by the Ficken Brothers; that he saw the letter the first time that McCarthy came to his father's place; that the letter was handed to him by his father, and to his father by McCarthy; that himself, McCarthy and his father were the only persons present; that he had searched for the letter among his father's papers and was unable to find it; that his father did not receive any shares of stock for the $6600.00 note.

On the part of appellees, N. O. Tallyn testified, among other things, that on May 5, 1913, McCarthy came to his farm as agent of said Assurance Company, and tried to sell stock for them, and that he had a letter with him. The said witness was permitted to state, over the objection of appellant, that the letter was signed by Ficken Brothers. Evidence was permitted to go to the jury that McCarthy had a letter from the Ficken Brothers, and it is insisted that he, being armed with the letter from them recommending McCarthy, they were in league with him.

No letter was produced. The evidence fails to show to whom it was addressed; the contents thereof were not known to the jury; the jury was left to reach its own conclusions as to the purpose of the inquiry about the letter.

All this inquiry about this letter, when they were unable to produce the letter or to show what its contents were, should not have been permitted to go to the jury. It was an attempt to connect appellant with McCarthy and thereby prejudice him in the eyes of the jury.

It will be observed that neither the appellant or the deceased brother was present at or had anything to do with the various transactions testified to and about by the son and brother of E.M.Tallyn. There is nothing in the evidence to show that the appellant or his deceased brother had anything to do at all with the sale of the

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stock; that the note bore date June 27, 1913, and was delivered to
father gave a note in the sum of $8800.00 for the said shares of

220 shares of stock made by McCarthy to Tallyn. In that transaction, Tallyn, instead of giving a note to the Farmer's Bank as in the former deals, gave McCarthy a note for $6600.00 payable to "myself or order", with his name "E.M.Tallyn" endorsed on the back of it. This note never came into the possession of the appellant or his deceased brother, or to the Assurance Company. McCarthy took it away, kept it, and appellees claim it was put in judgment in a court of record in Cook County.

The testimony relative to the 220 shares of stock made by McCarthy to Tallyn, and the note issued by Tallyn in payment for said shares of stock, and delivered to McCarthy, and the statement that E. M. Tallyn did not receive any stock for which the $6600.00 note was given, in view of the fact that the evidence shows that neither appellant or his deceased brother had any knowledge, at the time of this transaction, should not have been permitted to be heard by the jury.

This evidence could have no effect other than that of being detrimental to the interests of appellant. If, under the theory of appellant, this testimony was admissible for any purpose at all, it should have been stated to the jury the purpose for which it was offered.

Appellees offered, and it was admitted, over objections of appellant, a note for $6750.00, bearing date June 27, 1913, with interest at the rate of 6 per cent, payable to the Farmer's Bank of Benson, and due 12 months after date. It was sought to show that this was the original note, and that the notes upon which judgment was entered are renewals of this note. The evidence fails to disclose that the notes declared upon are renewals of the $6750.00 note. Without some evidence to establish this fact, the $6750.00 note could shed no light upon the issue involved in this cause. The most that can be said in favor of this contention is that it is a mere surmise that the notes sued on herein are renewals of the $6750.00 note.

It appears that N. O. Tallyn, a brother of E.M. Tallyn, the original defendant in this suit, had pending in Chicago, a certain

It appears that Mrs. O. Tally, a partner of E.M. Tally, the original defendant in this suit, and pending in Chicago, a certain

220 shares of stock made by McCarthy to Tally. In that transaction, Tally, instead of giving a note to the Farmer's Bank as in the former deals, gave McCarthy a note for $8000.00 payable to "myself or order", with his name "E.M.Tally" endorsed on the back of it. This note never came into the possession of the appellant or his deceased brother, or to the Assurance Company. McCarthy took it away, kept it, and appellees claim it was put in judgment in a court of record in Cook County.

The testimony relative to the 220 shares of stock made by McCarthy to Tally, and the note issued by Tally in payment for said shares of stock, and delivered to McCarthy, and the statement that E. M. Tally did not receive any stock for which the $8000.00 note was given, in view of the fact that the evidence shows that neither appellant or his deceased brother had any knowledge, at the time of this transaction, should not have been permitted to be heard by the jury.

This evidence could have no effect other than that of being detrimental to the interests of appellant. If, under the theory of appellant, this testimony was admissible for any purpose at all, it should have been stated to the jury the purpose for which it was offered.

Appellees offered, and it was admitted, over objections of appellant, a note for $8750.00, bearing date June 27, 1913, with interest at the rate of 8 per cent, payable to the Farmer's Bank of Benson, and due 12 months after date. It was sought to show that this was the original note, and that the notes upon which judgment was entered are renewals of this note. The evidence fails to disclose that the notes declared upon are renewals of the $8750.00 note. Without some evidence to establish this fact, the $8750.00 note could shed no light upon the issue involved in this cause. The most that can be said in favor of this contention is that it is a mere surmise that the notes sued on herein are renewals of the $8750.00 note.

suit against T. D McCarthy and one Mark J. Sullivan; that an affidavit was obtained from Theodore Ficken, who was one of the original plaintiffs in this cause, to be used in the case so pending in Chicago. It was an individual matter and did not relate in any manner whatever to the partnership business of Ficken Brothers; he was simply trying to furnish some information that would be of assistance to a patron of his bank, the said E. O. Tallyn; said affidavit was admitted by the court on the part of appellees over the objection of appellant, and among other things the said affidavit of the said Theodore Ficken stated that he resided at Benson, Illinois; was cashier of the Farmer's Bank of that place; that the complainant was a customer of his bank; that he knew the defendant, McCarthy; that after June 27, 1913, Joseph Stout, who was connected with the Assurance Company, informed him that he had not issued the stock which McCarthy had sold to the Tallyn Brothers; also stated that the reason he had not issued and would not issue stock was that McCarthy had refused to deliver the notes executed by Tallyn Brothers for $600.00 each; that he advised Tallyn Brothers of the fact in order that they might protect themselves. The affidavit further states what the said affiant did in going to Chicago with the Tallyns. This affidavit, while it was to be used in a suit pending inCook County concerning a transaction and law suit there pending, had no relation whatever to the partnership interest of the Ficken Brothers, and should not have been admitted in this case for that reason.

There is some evidence in this record testified to by DeWitte Tallyn to the effect that in the event E. M. Tallyn was called upon to pay the $6600.00 note or judgment that had been entered thereon, that he would not be required to pay the $6750.00 note in the hands of Ficken Brothers.

The evidence discloses the fact that after E. M. Tallyn had settled and adjusted the suit growing out of the $6600.00 note that was pending in Chicago, that he went to the bank and renewed the said $3750.00 note declared upon in this case, and there is no

suit against T. D McCarthy and one Mark J. Sullivan; that an affidavit was obtained from Theodore Ficken, who was one of the original plaintiffs in this cause, to be used in the case so pending in Chicago. It was an initiatual matter and did not relate in any manner whatever to the partnership business of Ficken Brothers; he was simply trying to furnish some information that would be of assistance to a patron of his bank, the said H. O. Tally; said affidavit was admitted by the court on the part of appellee over the objection of appellant, and among other things the said affidavit of the said Theodore Ficken stated that he resided at Benson, Illinois; was cashier of the Farmer's Bank of that place; that the complainant was a customer of his bank; that he knew the defendant, McCarthy; that after June 27, 1913, Joseph Stout, who was connected with the Assurance Company, informed him that he had not issued the stock which McCarthy had sold to the Tally Brothers; also stated that the reason he had not issued and would not issue stock was that McCarthy had refused to deliver the notes executed by Tally Brothers for $800.00 each; that he advised Tally Brothers of the fact in order that they might protect themselves. The affidavit further states what the said affiant did in going to Chicago with the Tallys. This affidavit, while it was to be used in a suit pending in Cook County concerning a transaction and law suit there pending, had no relation whatever to the partnership interest of the Ficken Brothers, and should not have been admitted in this case for that reason.

There is some evidence in this record beatified to by DeWitte Tally to the effect that in the event H. M. Tally was called upon to pay the $8800.00 note or judgment that had been entered thereon, that he would not be required to pay the $8750.00 note in the hands of Ficken Brothers.

The evidence discloses the fact that after H. M. Tally had settled and adjusted the suit growing out of the $8800.00 note that was pending in Chicago, that he went to the bank and removed the said $3750.00 note declared upon in this case, and there is no

evidence to show he demanded the $3000.00 note that he had previously executed and was then in the hands of the bank of Ficken Brothers, and upon which judgment was entered in this suit.

In view of the theory on which this case was tried by appellees, when considered in connection with the instructions of the court given in this cause on their part, it is not difficult to account for the verdict of the jury. The first instruction given on the part of appellees is as follows: "If the jury believe from a preponderance of the evidence that the two notes in suit for $3000.00 and $3750.00 were signed and delivered by E. M. Tallyn, without any good, valid or other sufficient consideration in law, as is alleged in certain pleas of the defendant, then it is your duty to find a verdict in favor of the defendant". This instruction directs a verdict in favor of appellees in case the jury believe from a preponderance of the evidence that Tallyn signed and delivered the notes, without any good, valid or other sufficient consideration in law, as alleged in certain pleas of appellees. This instruction, should have been accurate, but it leaves it for the jury to speculate on what some good, valid or other sufficient consideration in law may be, without any guide to go by in this or other instructions given in this cause. It also says "as alleged in certain pleas of the defendant". There are eight pleas in this record on which issue was joined. To which of the eight pleas was the jury to go in response to the instruction "as alleged in certain pleas of the defendant", in order to ascertain whether or not there was any good, valid, or other sufficient consideration for the notes in controversy.

We are not unmindful of the fact that appellant, in his first instruction, told the jury that they should find for the plaintiff, unless the defendant had proven his special pleas or some one of them, by a preponderance of all the evidence in the case. We recognize the rule to be that a party to a suit is not permitted to complain of an error of which he has been guilty of committing. Appellees did not only refer to the pleas in this instruction, but went so far as to say to the jury that if they believed from a preponderance of the

may to the jury that if they believed from a preponderance of the only refer to the pleas in this instruction, but went so far as to error of which he was been guilty of committing. Appellee will not rule to be that a party to a suit is not permitted to complain of an pleas of the defendant, then it is your duty to find a verdict in favor of the defendant". This instruction directs a verdict in favor of appellee in case the jury believe from a preponderance of the evidence that Tally signed and delivered the notes, without any good, valid or other sufficient consideration in law, as alleged in certain pleas of appellee. This instruction, should have been refused, but it leaves it for the jury to speculate on what some good, valid or other sufficient consideration in law may be, without any guide to go by in this or other instructions given in this cause. It also says "as alleged in certain pleas of the defendant". There are eight pleas in this record on which issue was joined. To which of the eight pleas was the jury to go in response to the instruction "as alleged in certain pleas of the defendant", in order to ascertain whether or not there was any good, valid, or other sufficient consideration for the notes in controversy.

We are not unmindful of the fact that appellant, in its first instruction, told the jury that they should find for the plaintiff, unless the defendant had proven his special pleas or some one of them, by a preponderance of all the evidence in the case. We recognize the rule to be that a party to a suit is not permitted to complain of an error of which he was been guilty of committing. Appellee will not

evidence to show he demanded the $3000.00 note that he had previously executed and was then in the hands of the bank of Pilot Grove, and upon which judgment was entered in this suit.

In view of the theory on which this case was tried by appellee, when considered in connection with the instructions of the court given in this cause on their part, it is not difficult to account for the verdict of the jury. The first instruction given on the part of appellee is as follows: "If the jury believe from a preponderance of the evidence that the two notes in suit for $3000.00 and $750.00 were signed and delivered by E. M Tally, without any good, valid

evidence that the notes in controversy were signed and delivered by Tallyn without any good, valid or other sufficient consideration in law, as alleged in certain pleas of the defendant, then it is the duty of the jury to find a verdict in favor of the defendant.

In relation to the giving of this instruction, the true criterion is, - was the instruction calculated to mislead the jury or to prejudice the rights and interest of the parties litigant? On account of the incompetent testimony offered on the part of appellees and admitted over the objections of appellant, and in view of the issues as made up, it can readily be seen that this instruction was calculated to work a prejudice of the rights of appellant.

Appellees second given instruction directed the jury to find the issues joined for the defendant in case they believed from a preponderance of the evidence, among other things, that the $6750.00 note was given by F. M. Tallyn, as averred in his second additional plea upon an agreement and arrangement between himself and the original plaintiffs that they should take and hold the note, and in case Tallyn should be compelled to pay or should pay any money because of or on the $6600.00 note which was put in judgment in Chicago, or if the said Tallyn should satisfy or cause the release and discharge of the said $6600.00 note then the said $6750.00 note was not to be collected or paid. This instruction did not require appellees to show that Tallyn carried out the arrangement and agreement and paid or satisfied in any way the $6600.00 note or judgment in Chicago. It directs a finding for the defendant on the issues joined without requiring the showing of a very essential part of the defense, the satisfaction of the Chicago matter by Tallyn. It will be remembered that the record discloses the fact that the surviving partner denied that there was any such arrangements as is claimed on the part of appellee, that in the event Tallyn satisfied the $6600.00 note or the judgment based thereon that he would not be required to pay the $6750.00 note. A controverted element and a very material one was omitted from said second instruction.

evidence that the notes in controversy were signed and delivered by Tallyn without any good, valid or other sufficient consideration in law, as alleged in certain pleas of the defendant, then it is the duty of the jury to find a verdict in favor of the defendant.

In relation to the giving of this instruction, the true criterion is, - was the instruction calculated to mislead the jury or to prejudice the rights and interest of the parties litigant? On account of the incompetent testimony offered on the part of appellee and admitted over the objections of appellant, and in view of the issues as made up, it can readily be seen that this instruction was calculated to work a prejudice of the rights of appellant.

Appellee's second given instruction directed the jury to find the issues joined for the defendant in case they believed from a preponderance of the evidence, among other things, that the $8730.00 note was given by E. M. Tallyn, as averred in his second additional plea upon an agreement and arrangement between himself and the original plaintiffs that they should take and hold the note, and in case Tallyn should be compelled to pay or should pay any money because of or on the $8800.00 note which was put in judgment in Chicago, or if the said Tallyn should satisfy or cause the release and discharge of the said $8800.00 note then the said $8730.00 note was not to be collected or paid. This instruction did not require appellee to show that Tallyn carried out the arrangement and agreement and paid or satisfied in any way the $8800.00 note or judgment in Chicago. It directs a finding for the defendant on the issues joined without requiring the showing of a very essential part of the defense, the satisfaction of the Chicago matter by Tallyn. It will be remembered that the record discloses the fact that the surviving partner denied that there was any such arrangements as is claimed on the part of appellee, that in the event Tallyn satisfied the $8800.00 note or the judgment based thereon that he would not be required to pay the $8730.00 note. A sanctioned element and a very material one was omitted from said second

instruction

In conclusions, it is conceded that E. M. Tallyn executed the notes in question. The law presumes that negotiable paper was regularly issued for a valuable consideration, and that the payee is a bona fide holder and entitled to recover the full amount thereof. Also, the rule is that every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and a valuable consideration is any consideration sufficient to support a simple contract.

As we observe this record and from what is disclosed therein, and in view of the instructions given by appellees to the jury, we are clearly of the opinion that the trial court erred in refusing to grant the motion for a new trial; that reversible error was committed in the trial of the case, and that the judgment should be reversed and the cause remanded, which is accordingly done.

Reversed and remanded.

In conclusions, it is conceded that K. W. Tally executed the notes in question. The law presumes that negotiable paper was regularly issued for a valuable consideration, and that the payee is a bona fide holder and entitled to recover the full amount thereof. Also, the rule is that every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and a valuable consideration is any consideration sufficient to support a simple contract.

As we observe this record and from what is disclosed therein, and in view of the instructions given by appellees to the jury, we are clearly of the opinion that the trial court erred in refusing to grant the motion for a new trial; that reversible error was committed in the trial of the case, and that the judgment should be reversed and the cause remanded, which is accordingly done.

Reversed and remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 21st day of Sept. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7179 Agenda 8

People of the State of
Illinois,
Defendant in error,

vs.

Andrew Wiborg,
Plaintiff in error,

Error to County Court
of Lake County

231 I.A. 625

Jett, J.

An information was filed in the County Court of Lake County against plaintiff in error Andrew Wiborg containing ten counts. The first, second and third counts of the information each charged the unlawful sale of intoxicating liquor. The fourth count charged the unlawful possession of intoxicating liquor. The remaining counts charged possession, disposing of, bartering, furnishing and selling intoxicating liquor, respectively.

A trial was had by a jury and the following verdict was returned: "We the jury find the defendant, Andrew Wiborg, guilty in manner and form as charged in count as indicated in form attached hereto of the information." The verdict was signed by the several members of the jury.

The trial was had before Judge DeWolf of Boone County, who was temporarily presiding in Lake County. By agreement of the parties a sealed verdict was to be returned and the jury permitted to separate. The jury returned the verdict in the form as above shown, and separated. The verdict was opened and published the following day by Judge Persons. Ten days after the said verdict had been received and the jury permitted to separate, the state's attorney moved the Court, Judge DeWolf having returned, and presiding, that the verdict heretofore returned be corrected. The motion of the state's attorney was heard and sustained and the jury was re-convened and instructed in an oral instruction by the court to again retire to the jury room in the custody of the same bailiff and to report into court a verdict in harmony with their intentions according to the two papers heretofore returned into court by the jury as their verdict and also gave the jury the information filed in the case.

7179

People of the State of

Illinois,

Defendant in error,

Error to Family Court

of Lake County

Plaintiff in error,

Andrew T. Wiborg.

Def't, P.

An information was filed in the County Court of Lake County against plaintiff in error Andrew Wiborg containing ten counts. The first, second and third counts of the information each charged the unlawful sale of intoxicating liquor. The fourth count charged the unlawful possession of intoxicating liquor. The remaining counts charged possession, disposing of, partaking, furnishing and selling intoxicating liquor, respectively.

A trial was had by a jury and the following verdict was returned: "We the jury find the defendant, Andrew Wiborg, guilty in manner and form as charged in count as indicated in form attached hereto of the information." The verdict was signed by the several members of the jury.

The trial was had before Judge DeWolf of Boone County, who was temporarily presiding in Lake County. By agreement of the parties a sealed verdict was to be returned and the jury permitted to separate. The jury returned the verdict in the form as above shown, and separated. The verdict was opened and published the following day by Judge Persons. Ten days after the said verdict had been moved the Court, Judge DeWolf having returned, and presiding, that the verdict heretofore returned be corrected. The motion of the state's attorney was heard and sustained and the jury was re-convened and instructed in an oral instruction by the court to again retire to the jury room in the custody of the same bailiff and to report into court a verdict in harmony with their instructions according to the two papers heretofore returned into court by the jury as their verdict and also form the information filed in the case.

A paper bearing no file mark nor other mark of identification was discovered among the files in the case. Neither party to this proceeding appears to know how the instrument got into the files nor by whom it was written. It is as follows:- "We the jury find the defendant, Andrew Wiberg, guilty in manner and form on two counts, namely; 1st. for being unlawfully in possession of intoxicating liquor and 2nd. for selling intoxicating liquor. Not having the bill of information, we are unable to give the counts as numbered in the information." This instrument is not signed.

From the record in this cause, the court at the time the oral instruction was given to the jury after being recalled, had in mind the verdict of the jury returned in the first instance and opened and published by Judge Persons and the instrument last above quoted which was unsigned.

The record discloses the fact that the court instructed the jury after being reconvened "to report into court a verdict in harmony with their intentions according to the two papers heretofore returned into court," The jury after retiring under the instructions of the court, returned the following verdict into open court, "We the jury find the defendant Andrew Wiberg guilty in manner and form as charged in counts numbered two and four of the information." The defendant interposed a proper objection to the courts action in again bringing the jury together and permitting it to return the last above mentioned verdict. Such objections were overruled.

Motions for a new trial and in arrest of judgment were made and each denied. Judgment was rendered on the verdict. The defendant was sentenced to pay a fine of $500.00 and to be imprisoned in the county jail for 180 days on each count.

The plaintiff in error makes complaint of the action of the court in admitting certain testimony and in the giving of certain instructions. It is also insisted that the judgment of conviction is not warranted by the evidence. Inasmuch however, as this cause must be reversed and remanded upon other grounds, we refrain from

A paper bearing no file mark nor other mark of identification must be received and returned upon other grounds, as relates from is not warranted by the evidence. However, as this cause instructions. It is also insisted that the jury was out certain counts in omitting certain testimony and in the giving of proceeding orderly to know how the instrument got into the files was placed among the files in the case. Neither party to this nor of which it was written. It is as follows:- "We the jury find the defendant, Andrew Hisorg, guilty in manner and form on two counts, namely; 1st. for being unlawfully in possession of intoxicating liquor and 2nd. for selling intoxicating liquor. Not having the gift of information, we are unable to give the counts as numbered in the information." This instrument is not signed.

Upon the record in this cause, the court at the time the oral instruction was given to the jury after being recalled, and in mind the verdict of the jury returned in the first instance and opened and examined by judge personally and the instrument last above quoted which was marked.

The record discloses the fact that the court instructed the jury after being returned to retire into court a verdict in accordance with its initial motion according to the two counts returned into court, "We the jury find the defendant Andrew Hisorg Guilty in manner and form as charged in counts numbered two and four of the information." The defendant interposed a formal objection to the counts so in again bringing the jury together and permitting it to return the last above mentioned verdict. Even objections were overruled. Motions for a new trial and in arrest of judgment were made and each denied. Judge at was rendered on the verdict. The defendant was sentenced to pay a fine of $300.00 and to be imprisoned in the county jail for 120 days on each count.

The plaintiff in error makes complaint of the action of the court in refusing certain instructions. It is also insisted that the jury was out of the room a sufficient length of time to consider the evidence. However, as this cause must be reversed and remanded upon other grounds, we refrain from

discussing a question not related to the error which works a reversal herein.

We are clearly of the opinion that the first verdict was so informal and defective that no judgment of conviction could be entered thereon; that the instrument found among the files above referred to and which was unsigned and which the court appeared to treat in the light of a verdict is entitled to no consideration in this case; that the court was without authority to again assemble the jury as was done in this cause and to permit a corrected verdict to be returned.

Such a practice is certainly too loose to be sanctioned. After the jury had been separated for a period of ten days the cause was then beyond their control. The judgment is therefore reversed and the cause remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 21st day of Sept. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7187

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 625

BE IT REMEMBERED, that afterwards, to-wit: On AUG 15 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State of Illinois,
Defendant in error,
vs. Error to Circuit Court
Charles Finefield, of Livingston County.
Plaintiff in error,

231 I.A.

Jett, J.

The plaintiff in error, Charles Finefield, was found guilty in the Circuit Court of Livingston County, of unlawfully selling intoxicating liquor in violation of the Illinois Prohibition Act, as charged in count three of the indictment returned against him. Judgment was entered on the finding of the jury and he was sentenced to the county jail of Livingston County for and during the term of 90 days and a writ of error has been sued out to review this judgment.

It is insisted by plaintiff in error that the verdict of the jury is not sustained by the evidence. The testimony on behalf of the People shows that the sheriff of Livingston County employed C. H. Ledderboge and Clifford Walters to investigate the illegal sale of intoxicating liquors in the village of Odell, near which place the said Charles Finefield resided. The said Ledderboge and the said Walters went to the village of Odell, on September 28, 1922, and met Charles Millwood at Barrows' pool hall and the said Walters met him later in Harry Schultz's dry cleaning shop where they were having "a little game". The said Millwood informed Walters that if he would furnish the money that he, Millwood, would get some liquor for him. Walters went to Ledderboge for the purpose of getting the keys of their Ford coupe and told him to get on the car. Walters returned to Millwood, they got into the car and drove out to the residence of the plaintiff in error, which place was at the egde of the town. The said Ledderboge rode on the side of the car which Walters was driving. The said Millwood had known Charles Finefield for about three years and knew where he lived. Upon arriving at the home of the plaintiff in error Millwood got out of the car and went to the side door of the house and asked

The People of the State of Illinois,

Defendant in error,

vs. Error to Circuit Court

Charles Pinefield, of Livingston County.

Plaintiff in error,

Dett, J.

The plaintiff in error, Charles Pinefield, was found guilty in the Circuit Court of Livingston County, of unlawfully selling intoxicating liquor in violation of the Illinois Prohibition Act, as charged in count three of the indictment returned against him. Judgment was entered on the finding of the jury and he was sentenced to the county jail of Livingston County for and during the term of 90 days and a writ of error has been sued out to review this judgment.

It is insisted by plaintiff in error that the verdict of the jury is not sustained by the evidence. The testimony on behalf of the People shows that the sheriff of Livingston County employed G. H. Ledderbogo and Clifford Walters to investigate the illegal sale of intoxicating liquors in the village of Odell, near which place the said Charles Pinefield resided. The said Ledderbogo and the said Walters went to the village of Odell, on September 25, 1922, and met Charles Millwood at Barrows' pool hall and the said Walters met him later in Henry Schultz's dry cleaning shop where they were having "a little game". The said Millwood informed Walters that it he would furnish the money that he, Millwood, would get some liquor for him. Walters went to Ledderbogo for the purpose of getting the keys of their Ford coupe and told him to get on the car. Walters returned to Millwood, they got into the car and drove out to the residence of the plaintiff in error, which place was at the edge of the town. The said Ledderbogo rode on the side of the car which Walters was driving. The said Millwood had known Charles Pinefield for about three years and knew where he lived. Upon arriving at the home of the plaintiff in error Millwood got out of the car and went to the side door of the house and rapped

the plaintiff in error if he had any moonshine and plaintiff in error replied that he had two quarts. Millwood then went back to Walters in the car and told him that the plaintiff in error had two quarts and he wanted $3.00 a quart. Walters then gave Millwood $6.00. Millwood then returned to the side door and gave the plaintiff in error the $6.00 and received the two bottles. He immediately delivered the two bottles to Walters. These two bottles were identified and introduced in evidence and the testimony established the fact that they each contained more than forty per cent alcohol by volume.

The evidence further shows that on September 30, 1922, Ledderboge and Walters went to the residence of the plaintiff in error, and Walters introduced Ledderboge to plaintiff in error. Ledderboge told plaintiff in error he wanted to get some whiskey for over Sunday. Plaintiff in error said he would see what he could do; he went to the side door of his house and came back and said that the boy did not have any bottled but that he would go out to the barn and see what he could find. Plaintiff in error returned from the barn and delivered to Ledderboge some whiskey for which he was paid $3.00. This bottle was also analyzed and was found to contain more than forty per cent alcohol, and was used as evidence on the trial of the case.

The plaintiff in error testified in his own behalf and denied everything except that he knew Millwood; that he had never seen nor met Ledderboge or Walters; that he had not made a sale of whiskey or liquor to them or either of them nor to Millwood. After the plaintiff in error had been found guilty by the jury he made a motion for a new trial and one of the reasons relied upon was newly discovered evidence which was based upon an affidavit made by himself. The court overruled the motion for a new trial. Plaintiff in error then made a motion to be released on probation which was referred to the probation officer.

This cause was then continued to the January term, 1923, of said court upon motion of plaintiff in error. At said term plaintiff in error made a motion for leave to file additional affidavits

This cause was then continued to the January term, 1939, of said court upon motion of plaintiff in error. At said term plaintiff in error made a motion for leave to file additional affidavits in support of its motion for a new trial. Plaintiff in error replied that he had two quarts. Millwood then went back to Walters in the car and told him that the plaintiff in error had two quarts and he wanted $6.00 a quart. Walters then gave Millwood $6.00. Millwood then returned to the side door and gave the plaintiff in error the $6.00 and received the two bottles. He immediately delivered the two bottles to Walters. These two bottles were identified and introduced in evidence and the testimony established the fact that they each contained more than forty per cent alcohol by volume.

The evidence further shows that on September 30, 1938, Ledbetter and Walters went to the residence of the plaintiff in error, and Walters introduced Ledbetter to plaintiff in error. Ledbetter told plaintiff in error he wanted to get some whiskey for over Sunday. Plaintiff in error said he would see what he could do; he went to the side door of his home and came back and said that the boy did not have any bottled but that he would go out to the barn and see what he could find. Plaintiff in error returned from the barn and delivered to Ledbetter some whiskey for which he was paid $6.00. This bottle was also analyzed and was found to contain more than forty per cent alcohol, and was used as evidence on the trial of the case.

The plaintiff in error testified in his own behalf and denied everything except that he knew Millwood; that he had never seen nor met Ledbetter or Walters; that he had not made a sale of whiskey or liquor to them or either of them nor to Millwood. After the plaintiff in error had been found guilty by the jury he made a motion for a new trial and one of the reasons relied upon was newly discovered evidence which was owned upon an affidavit made by himself. The court overruled the motion for a new trial. Plaintiff in error then made a motion to be released on probation which was referred to the probation officer.

in support of his motion for a new trial and to set aside the order already entered denying a new trial. The court denied the motion for leave to file additional affidavits in support of said motion for a new trial and refused to set aside the order overruling the motion for a new trial, and denied application of plaintiff in error to be released on probation. Judgment was rendered as above indicated on the verdict of the jury.

Plaintiff in error insists that the judgment of conviction is based on evidence of so unsatisfactory character that it leaves a serious doubt of the guilt of the plaintiff in error. This was peculiarly a case for a jury, and it was the province of the jury to determine the weight of the evidence. If the jury believed the evidence on behalf of the People established the guilt of the plaintiff in error beyond a reasonable doubt, it was the duty of the jury to find the plaintiff in error guilty. If they believed the evidence on behalf of the plaintiff in error the jury should have found him not guilty. Where there is merely a conflict in the evidence the verdict will be affirmed. Duffy vs. People, 98 Ill. App. 34; People vs. Eastman 93 Ill. 112.

A verdict will not be reversed unless it appears that it is not sustained by the evidence beyond a reasonable doubt. Steffy vs. People, 130 Ill. 98; McCoy vs. People, 175 Ill. 224. We cannot say the evidence does not establish the guilt of the plaintiff in error beyond a reasonable doubt and we do not feel justified in setting aside the verdict on account of insufficient evidence to sustain it.

In support of the motion for a new trial the plaintiff in error filed his own affidavit claiming the discovery of new evidence. There is nothing in the affidavit of the plaintiff in error worthy of consideration in support of the motion for a new trial. The additional affidavits plaintiff in error sought to have considered in support of the motion for a new trial stated facts that were of an impeaching character. The additional affidavits indicate that plaintiff in error would prove that Ledderboge and

in support of his motion for a new trial and to set aside the order already entered denying a new trial. The court denied the motion for leave to file additional affidavits in support of said motion for a new trial and refused to set aside the order overruling the motion for a new trial, and denied application of plaintiff in error to be released on probation. Judgment was rendered as above indicated on the verdict of the jury.

Plaintiff in error insists that the judgment of conviction is based on evidence of so unsatisfactory character that it leaves a serious doubt of the guilt of the plaintiff in error. This was peculiarly a case for a jury, and it was the province of the jury to determine the weight of the evidence. If the jury believed the evidence on behalf of the People established the guilt of the plaintiff in error beyond a reasonable doubt, it was the duty of the jury to find the plaintiff in error guilty. If they believed the evidence on behalf of the plaintiff in error the jury should have found him not guilty. Where there is merely a conflict in the evidence the verdict will be affirmed. Duffy vs. People, 98 Ill. App. 34; People vs. Beatman 93 Ill. 112.

A verdict will not be reversed unless it appears that it is not sustained by the evidence beyond a reasonable doubt. Steffy vs. People, 130 Ill. 98; McCoy vs. People, 175 Ill. 224. We cannot say the evidence does not establish the guilt of the plaintiff in error beyond a reasonable doubt and we do not feel justified in setting aside the verdict on account of insufficient evidence to sustain it.

In support of the motion for a new trial the plaintiff in error filed his own affidavit claiming the discovery of new evidence. There is nothing in the affidavit of the plaintiff in error worthy of consideration in support of the motion for a new trial. The additional affidavits plaintiff in error sought to have considered in support of the motion for a new trial added facts that were of an impeaching character. The additional affidavits indicate that plaintiff in error would prove that badgerboys and

Walters were in the dry cleaning establishment of Schultz or in Barrows' pool hall on the days in question from 6 to 7 o'clock in the evening until 11 o'clock that night. In order to justify a new trial on the ground of newly discovered evidence it must appear that the evidence would probably change the result if the new trial was granted. The evidence must have been discovered since the trial and the affidavits must show that it could not have been discovered before the trial by the exercise of due diligence. It must be material to the issue. It must not be merely cumulative or in the nature of impeaching evidence. People v. Williams 242 Ill. 197.

In People v. Johnson, 298 Ill. 52, on page 60 it was said; "Applications for a new trial on the ground of newly discovered evidence are not looked upon with favor by the courts, and, in order to prevent as far as possible, fraud and imposition which the defeated parties might be tempted to practice as a last resort to escape the consequences of an adverse verdict, such application will be subject to the closest scrutiny by the court, and the burden will be upon the applicant to rebut the presumption the verdict is correct and that there was no lack of due diligence."

The indictment was returned into open court October 5, 1922. The trial was on December 13, 1922. The names of Ledderboge, Millwood and other witnesses were on the back of the indictment. Plaintiff in error had knowledge of this fact and if he had desired to do so he could have talked to the witnesses and ascertained what they knew about the case and this would undoubtedly have led to a discovery of the evidence set out in the affidavits. The affidavits are silent as to any reason or excuse why the facts could not have been discovered before the trial by the exercise of due diligence. Applying the rule as we understand it and taking into consideration the purpose of the affidavits sought to be filed in support of the motion for a new trial, we are not prepared to say the trial court committed error in refusing to grant the motion to file the additional affidavits. It is quite

appeared that the exercise of due diligence by the plaintiff in error would have discovered the evidence in ample time and to have secured it for the trial. There is but little testimony as illustrated by those additional affidavits that is not of an impeaching character. The judgment of the circuit court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of Oct. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 625

BE IT REMEMBERED, that afterwards, to-wit: On 022 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Sam Ferrero,

appellee

vs.

L. D. Spaulding, sheriff of Bureau County, Illinois.

appellant,

Appeal from the Circuit Court of Bureau County

Jett, J.

By virtue of an execution dated July 31, 1922, against L. F. Gufford, which was placed in the hands of appellant on August 1, 1922, he, as sheriff of Bureau County, on August 17, 1922, levied upon a five passenger Gardner automobile as the property of said Gufford. The following day appellee, claiming to be the owner of the automobile, instituted this replevin suit and upon a trial had before a jury a verdict was returned in his favor upon which judgment was rendered and appellant appealed.

It appears from the evidence of appellee who testified in his own behalf and who was the only witness on the part of appellee examined in chief, that he was a resident of Marseilles and that on Sunday August 6, 1922, he came to Spring Valley and talked with Gufford, (his wife Gertrude Gufford being present), about purchasing this Gardner car. On the following Sunday, August 13, he returned to Spring Valley, saw Gufford and after some preliminary negotiations bought the car for $340.00, paying $20.00 cash to Gufford and agreeing to pay the balance on the following Tuesday. Appellee drove away in the car after Gufford handed him a short statement of the transaction using a tag of the Spring Valley Car Exchange and having those words printed thereon and opposite the printed word, "Salesman", Frank Gufford wrote his name.

On the following Wednesday, appellee returned to Spring Valley, advised with his attorney and insisted upon having a bill of sale from Gufford.

Gufford testified on behalf of the appellant that he was a

Sam Ferraro,

appellee

vs.

Appeal from the Circuit
Court of Bureau County

appellant.

Bett, J.

By virtue of an execution dated July 31, 1922, against P. D. Spaulding, sheriff of Bureau County, Illinois.

P. D. Spaulding, sheriff
of Bureau County, Illinois.

appellant,

vs.

Sam Ferraro,

appellee

Appeal from the Circuit
Court of Bureau County

Gulford testified on behalf of the appellant that he was advised with his attorney and insisted upon having a bill of sale from Gulford.

On the following Wednesday, appellee returned to Spring Valley, printed word, "Salesman". Frank Gulford wrote his name.

Exchange and having those words printed thereon and opposite the statement of the transaction using a leg of the Spring Valley Car Appellee drove away in the car after Gulford handed him a short Gulford and agreeing to pay the balance on the following Tuesday. negotiations bought the car for $340.00, paying $30.00 cash to turned to Spring Valley, new Gulford and after some preliminary ing this Carmer car. On the following Tuesday, August 12, he re- Gulford, (his wife Gertrude Gulford being present), about hundred- on Sunday August 6, 1922, he came to Spring Valley and talked with examined in chief, that he was a resident of Marseilles and that own behalf and who was the only witness on the part of appellee

It appears from the evidence of appellee who testified in his Judgment was rendered and appellant appealed.

had before a jury a verdict was returned in his favor upon which the automobile, instituted this replevin suit and upon a trial Gulford. The following day appellee, claiming to be the owner of upon a five passenger Carmer automobile as the property of said 1922, he, as sheriff of Bureau County, on August 17, 1922, levied Gulford, which was placed in the hands of sheriff on August 1,

By virtue of an execution dated July 31, 1922, against P. D.

dealer in used cars and conducted his buriness under the name of the Spring Valley Used Car Exchange; and that about the first of August he was the owner of a Sedan which he traded to Mrs. Mulholland for this Gardner car which he subsequently sold to appellee; Gufford testified positively that he owned this car before he sold it to appellee and insists that he told appellee and his attorney that he wanted to do business with reference to this car in his wife's name because there was an execution out against him; that the attorney acting for appellee, accompanied by James Dewey, a Justice of the Peace, and Gufford, went to Cherry, where Mrs. Mulholland lived and there procured her signature to a bill of sale which evidenced Gufford's ownership of the Gardner car; this was done on August 16, but before the balance of the purchase price was paid. This bill of sale was ante-dated and it bears the date of and purports to have been acknowledged on August 9th.

Upon the return from Cherry, to the office of appellee's attorney a bill of sale was made out and executed by Gufford to appellee. Appellee came in and inquired if the bill of sale was executed and was informed by his attorney that it was and that everything was ready for him to pay Gufford and it was at this time before appellee had paid any money, that an officer came in and informed them that he had the Fraser attachment writ and that thereafter appellee laid the money on the table and appellee's attorney took it. Gufford knew that there was an execution out against him and for that reason informed appellee's attorney that he wanted to do business with reference to this car in his wife's name but appellee insisted upon a bill of sale from Mrs. Mulholland to Gufford and from Gufford to appellee.

The foregoing was all the material evidence except in rebuttal James Dewey testified that he had heard Gufford say upon their return from Cherry that the automobile which he had traded to Mrs. Mulholland belonged to his wife, and that the Spring Valley Used Car Exchange was his wife's. Gufford denied making these statements.

statements.

Used Car Exchange was his wife's. Gulford denied making these

to Mrs. Mulholland belonged to his wife, and that the Spring Valley their return from Cherry that the automobile which he had traded

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laid the money on the table and appellee's attorney took it. Gulford

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had paid any money, that an officer came in and informed them that

ready for him to pay Gulford and it was at this time before appellee

was informed by his attorney that it was and that everything was

Appellee came in and inquired if the bill of sale was executed and

a bill of sale was made out and executed by Gulford to appellee.

Upon the return from Cherry, to the office of appellee's attorney

of and purports to have been acknowledged on August 8th.

was paid. This bill of sale was ante-dated and it bears the date

was done on August 1s, but before the balance of the purchase price

sale which evidenced Gulford's ownership of the Gardner car; this

Mulholland lived and there procured her signature to a bill of

Justice of the Peace, and Gulford, went to Cherry, where Mrs.

the attorney acting for appellee, accompanied by James Dewey, a

wife's name because there was an execution out against him; that

it to appellee and insists that he told appellee and his attorney

Gulford testified positively that he owned this car before he sold

bolland for this Gardner car which he subsequently sold to appellee;

August he was the owner of a Sedan which he traded to Mrs. Mul-

the Spring Valley Used Car Exchange; and that about the first of

dealer in used cars and conducted his business under the name of

It was the contention of appellee in the trial court and it is his contention here that at the time he purchased this car from Gufford it belonged to the Spring Valley Used Car Exchange, a business owned by Gertrude Gufford, the wife of Frank Gufford and that at that time Frank Gufford was acting for her as her agent. The evidence shows however, that the car replevined was Gufford's. His title was evinced by a bill of sale and he as owner executed a bill of sale to appellee. Under this evidence we do not see how the judgment in favor of appellee can be sustained.

From the moment Gufford became the owner of this Gardner car, the execution which was at that time in the hands of appellant attached and became a lien thereon.

Second National Bank v. Gilbert, 174 Ill. 485-494.

It is apparent from this record that appellee did not act in good faith in making this purchase but his purpose was to manipulate the transaction that Gufford would get a bill of sale in his own name and the judgment against Gufford could then be collected. The usual and customary manner of transacting business was not observed by appellee and if he is injured by our findings he can blame no one other than himself.

Appellant complains of the fifth and sixth instructions given on behalf of appellee. What we have said renders it unnecessary to consider these instructions but we believe there was no error committed by the court in giving them nor did the court err in refusing appellant's 22nd and 24th instructions, as the law governing the issues was fully stated in the 11th, 12th and 13th instructions.

We conclude therefore that the judgment should be reversed, and the cause remanded, which is accordingly done.

Reversed and remanded.

Reversed and remanded.

We conclude therefore that the judgment should be reversed, and the cause remanded, which is accordingly done.

Appellant complains of the fifth and sixth instructions given on behalf of appellee. What we have said renders it unnecessary to consider these instructions but we believe there was no error committed by the court in giving them nor did the court err in refusing appellant's 22nd and 24th instructions, as the law governing the issues was fully stated in the 11th, 13th and 13th instructions.

Second National Bank v. Gilbert, 174 Ill. 485-494.

It is apparent from this record that appellee did not act in good faith in making this purchase but his purchase was to manipulate the transaction that Guilford would get a bill of sale in his own name and the judgment against Guilford could then be collected. The usual and customary manner of transacting business was not observed by appellee and if he is injured by our findings he can blame no one other than himself.

It was the contention of appellee in the trial court and it is his contention here that at the time he purchased this car from Guilford it belonged to the Spring Valley Used Car Exchange, a business owned by Gertrude Guilford, the wife of Frank Guilford and that at that time Frank Guilford was acting for her as her agent. The evidence shows however, that the car replevined was Guilford's. His title was evinced by a bill of sale and he as owner executed a bill of sale to appellee. Under this evidence we do not see how the judgment in favor of appellee can be sustained.

From the moment Guilford became the owner of this Gardner car, the execution which was at that time in the hands of appellant attached and became a lien thereon.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 21st day of Sept in the year of our Lord one thousand nine hundred and twenty-three.

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7053 Ag. No. 1

Will County Produce Co.,

Plaintiff in Error,

vs. Error to Will

Joseph Freedman,

Defendant in Error,

231 I.A. 625

Jones, J.

The plaintiff in error brought suit against the defendant in error before a justice of the peace in Will County and obtained a judgment for $100. The defendant in error prosecuted an appeal to the circuit court of Will County to the May term, 1921, thereof. The record in this case sets out what purports to be rules three and five of the circuit court of Will County. Rule three provides that, "The appellant shall file a written appearance in this court before the third day of the term commencing not less than ten days next after the transcript is filed in this court. The appellee shall file a written appearance by the same time if the appeal bond is filed in the court below, but if it is filed in this court, appellee shall file such appearance before the third day of the term to which the appeal summons served upon him is returnable. If such appearance is not filed, the cause may be placed on the trial calendar without notice." Rule five provides that "When a cause is reached on a call of the trial calendar, it shall immediately be tried, dismissed or continued for good cause shown; but the court may at its discretion set a cause for trial out of its order". Plaintiff in error filed a notice with the clerk of the court asking that the case be set for trial at the May term, 1921. The defendant in error entered his appearance and also asked that the case be s t for trial at the May term. On June 24th, 1921, defendant in error moved the court to dismiss the suit because plaintiff had not entered its appearance as required by said Rule three. The motion was allowed without notice to plaintiff and the suit was dismissed. ~~The~~ We

Cause No. 7033 Ct. No. 1

Bill County Precinct No.,

Plaintiff in Error,

vs.

Joseph Brown,

Defendant in Error.

Jones, J.

The plaintiff in error brought suit against the defendant before a justice of the peace in Bill County and obtained judgment for $100. The defendant in error appealed to the district court of Bill County, the plaintiff. The parties in this case will hereafter be referred to as they were in the lower court, that is, the plaintiff and the defendant. The action was brought to recover the value of a certain mule which the defendant had taken from the plaintiff. The defendant in error claimed the mule as his property, and also claimed that the mule had been taken from him by the plaintiff in error without notice to plaintiff and for the use of the county. The case was tried at the May term, 1888, before the court and a jury. On June 26th, 1888, judgment in favor of the defendant was rendered by the court. The motion was overruled by the court to dismiss the suit because plaintiff had not served defendant an undated at least five days before the trial

think the filing of a notice by plaintiff asking that the cause be set for trial was tantamount to an entry of appearance. (Hohmann v. Eiterman, 83 Ill. 92). However, the plaintiff in error took no action after the entry of judgment during the May term, 1921.

In October, 1921, during the succeeding term of court plaintiff in error made a motion to vacate the order of June 24th dismissing the suit, which motion was overruled and this writ of error is prosecuted to review that ruling.

The judgment in this case must be affirmed because the record contains no bill of exceptions. The rules above mentioned and the motions made in the case were sought to be incorporated in the record and are certified to by the clerk. Rules of practice, the motions with relation thereto and the facts upon which such motions are based must be incorporated in a bill of exceptions, under a certificate of the trial judge. (Marshall vs. Lufkin, 127 Ill. App. 595; Grundies vs. Martin, 90 Ill. 552; Alley vs. McCabe, 147 Ill. 410; Cella vs. Chicago & W. I. R. Co. 217 Ill. 326).

Because these matters are not contained in a bill of exceptions certified to by the trial court, this court cannot pass upon the questions sought to be raised. Perceiving no error upon the fact of the record properly before us we must affirm the judgment.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of Sept. in the year of our Lord one thousand nine hundred and twenty-three.

Justus L. Johnson

Clerk of the Appellate Court.

7094

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 62.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7034 Ag. No. 7

Nels Olson,

appellee,

vs. Appeal from Grundy

Jerry Sproull,

appellant,

231 I.A. 62

Jones, J.

Nels Olson, the appellee filed his suit before a justice of the peace in Grundy County, Illinois against Jerry Sproull, the appellant, for recovery of wages alleged to be due him for putting in tile upon the farm of the appellant, at the price of fifty cents a rod. The appellee went to the appellant's farm in April, 1930, and the appellant with his team and plow marked out the line of one ditch for a distance of about 31 rods. He also marked out three lateral ditches. Olson dug 239 rods and 9¼ feet and claims to have completed his contract. The appellant objected to the work claiming that the tile was not laid deep enough. Appellee then took up and re-laid at a lower level 14 rods of the tile. Upon further complaint by appellant of the character of the work done, appellee refused to re-lay any more of the tile and left the place. The evidence tends to show that appellee had completed the ditching originally staked out for him and the work of re-laying tile at the depth desired by the appellant would have been in addition to that called for by the contract. Appellant afterwards employed Edward Hyslop to do this additional work.

Upon the trial in the justice court, appellee recovered a judgment of $100 and appellant appealed to the circuit court. Upon the trial in the circuit court the jury returned a verdict against appellant for $136.25. A motion to set aside the verdict was overruled by the court. Thereupon appellee moved the court to hear evidence and fix attorney's fees. Over the objection of appellant, the court fixed the sum of $50 to be taxed as attorney's fees and entered judgment on the verdict and for costs including the allowance of attorney's fees.

Docket No. 74

Appellant,

vs.

Mesa Citrus,

Appellee.

Jerry Spurgin,

Appellant,

vs.

Mesa Citrus,

Appellee.

It is first urged that the court erred in admitting improper evi - dence and in permitting leading questions to be put to appellee's witnesses on direct examination. The abstract shows the witness answered that he did not remember with respect to the evidence claimed to have been improperly admitted and that the court struck out the answers to the leading questions. We see no merit in this contention.

It is next urged that the appellant should have been permitted to prove how much he paid the workman Edward Hyslop for doing said additional work. Inasmuch as the jury found that appellant had completed his work in conformity with his contract it makes no difference how much appellant paid Hyslop and appellant was not injured by the court's ruling.

If the tile were properly laid the contract was fully performed, and if it were not laid in a good and workmanlike manner the contract was not fully performed. That issue was submitted to the jury under instructions tendered by both parties. The first given instruction of the appellant is based wholly upon that proposition.

The rulings of the court on the giving and refusing of instructions were therefore correct.

Complaint is also made of the allowance of attorney's fees to the appellee. The verdict is not set out in the abstract. Without searching the record the court is unable to determine whether or not the jury by its verdict found that the recovery by the plaintiff was for wages earned and due. This court is under no duty to and will not search the record to ascertain facts not disclosed by the abstract of the record. The point raised will not b reviewed. Finding no error, the judgment of the trial court will be affirmed.

Judgment affirmed.

Tolerably slippery.

at the print comes will be slippery.

The point raised will not be retained. Turning to nature, the judgment
planed to examine facts not disclosed by the evidence of the record.
refused and due. This court is unable to see with any measure the
by pro notice found that the Secretary of the Treasury can also allow
ing the record the court is unable to determine whether or not the jury
objection. The matter is not set in the abstract. Without ascer-

Complaint is also made of the allowance of attorney's fees to the re-
sale therefore matter.

The rulings of the court on the first and fifteenth of September
is proper modify upon that proposition.

modified by four parties. The first final instruction of the complaint
first petitioner. That party was authorized to the final motion instruction
it is also not fair in a good and workmanlike manner the contract was not
it one time were carefully like the contract are fully performed, and

refund.

effecting fair dealing and objections are not inferred of its limits,
ment is contrary with its contract it seeks no difficulties the mere
ty sale. Inasmuch as the final decree that defendant pay sufficient is
pense now must be paid the workmen Ernest Myers for merit until qualifica-

It is next urged that the objection should have been disallowed as
the taxing questions. We see no merit in such contention.

been judicially limited and that the court did not the appeal to
lose that he did not tenement with reference to the fulfillment imposed by pur-
ponse on first examination. The objection must be sustained
decree may be terminating pending questions to be set by complainant's bill-
It is final appeal that need to multiple statutes and

STATE OF ILLINOIS,
SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 21st day of Sept. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7099

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 626

BE IT REMEMBERED, that afterwards, to-wit: On AUG 7 2 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7099 Ag. No. 52

Charles S. Cullen, and
Lewis Gowen, Partners,
etc.,
appellees,

vs. Appeal from La Salle

Burton S. Jordan,
appellant

231 I. App. 24

Jones, J.

In 1911, the appellees leased to appellant a store room in the City of Ottawa, to be used by the appellant as a moving picture theater. The lease was in writing and provided that at the expiration the appellant should have the right to remove all of the property which he might put in the building during the term of his lease. When the lease was about to expire a new lease for a period of three years was entered into which contained the same provision for removal of property. In May, 1915, previous to the expiration of this lease the parties had a conversation about what the appellant intended to do with the property he had put into the building. This property consisted of certain partitions, an operator's booth, wiring, frescoing and other like improvements. Appellant told appellees that under his lease he had a right to remove this property and that he intended to do so. Appellees endeavored to purchase the property in the building but the appellant refused to sell it, whereupon appellees filed their bill in the circuit court of La Salle County praying for an injunction restraining appellant from removing the property. A temporary injunction was issued and appellant moved to dissolve it. In support of his motion affidavits were presented and the matter was argued before the chancellor, but the chancellor did not act upon the motion at that time, but later announced that he would refer the cause to the Master to take the evidence and would consider the motion to dissolve at the final hearing.

The case was in court for about three years. At the final hearing the court entered a decree which did not, in specific terms, dispose of the motion to dissolve the temporary injunction but made

Docket No. 7068

Charles C. Quilen, and
Lenia Dawn, Partners,
etc.,

vs.

Burton E. Jordan,

Lewis, J.

In Equity. The appeals a lawsuit to [illegible]
the City of Dawson, to be used [illegible]
Kimmich. The issue was in existing use [illegible]
tion the appellants should have the right to remove [illegible]
property which he might put in the building [illegible]
lease. When the lease was about to expire a new lease for a [illegible]
of time prior was entered into which continued for more [illegible]
from renewal of property. In May, 1915, previous to the expiration
of this lease the parties had a conversation about what the [illegible]
transpired to do with the property in and [illegible]
problem consisted of certain partitions, an [illegible], right,
fireproofing and other like improvements. Implement [illegible]
that under the lease he had a right to remove [illegible]
be understood to do so. Appellee endeavored to [illegible]
in the building out the appellant refused [illegible]
appellee filed bill in the [illegible]
praying for an injunction restraining [illegible]
Knowlt. A temporary injunction was [illegible]
to dissolve it. On account of the motion [illegible]
and the matter was argued before the [illegible]
did not act upon the motion at that time, but [illegible]
he would after the court by the [illegible]
would constitute the motion to [illegible].

The case was in court for about three [illegible]
hearing the court rendered a decree which [illegible],
[illegible] of the motion to [illegible]

the injunction permanent. There was an appeal to this court, where the decree of the circuit court was reversed and the cause remanded with directions to dismiss the bill on the ground that under the lease the appellant was the owner of the property in question and should have been permitted to remove the same. (Cullen and Gowen vs. Jordan, 213 Ill. App. 698).

Upon the case being reinstated in the circuit court, appellant made a suggestion of damages. After a hearing the court allowed $285.00 as solicitor's fees and other damages amounting to $485.00 with $152.63 interest thereon, making a total of $922.63. The decree dismissed the bill for want of equity and this appeal is prosecuted to review the allowance of such damages.

The court fixed the damages to the property at its value, removed from the building. It is contended by appellant that the true measure of damages is the value of the property in place in the building. We cannot agree with this contention. His only right was to remove it from the building and make such use of it as he could. He relies upon Smyth v. Stoddard, 303 Ill. 424, as sustaining his contention. That case is to be distinguished from the case at bar in this, that there the tenant had a contract by which the landlord agreed either to permit the tenant to remove the property from the premises or to purchase the property at its fair value on the premises. The landlord sold the premises to a purchaser who had no notice of the rights of the tenant, and the property as between the tenant and the purchaser being real estate passed to the purchaser. The landlord was unable to perform the alternative of permitting the tenant to remove the fixtures. The court held the measure of damages to be the value of the property on the premises and that the conversion by the landlords constituted an election on their part to pay the appellee "a fair consideration".

It is said in Collins v. Sinclair, 51 Ill. 328, that, "Whatever might be the rule if this were an action of trespass brought by Sinclair against Collins in this proceeding, the damages for suing out the injunction should rest upon equitable grounds and should not

exceed the damages actually sustained." If the rule contended by the appellant were adopted in this case the appellant would be allowed to go beyond his actual damages and recover for the value of the property when attached to the appellees' building. This was not the agreement between the parties. The chancellor seems to have arrived at the fair value of the property removed from the building.

The most serious question which arises in the case is with respect to the allowance of solicitor's fees. The statute provides for the allowance of solicitor's fees earned only on a motion to dissolve a temporary injunction. A motion was made by the appellant to dissolve. Affidavits were filed in support of the motion and the case was argued but there was no specific ruling. Upon the appeal to this court in the first instance we held that the decree making the injunction permanent had the effect of overruling the motion to dissolve. If there had been an order entered expressly overruling the motion to dissolve no one would question the right of appellant to recover solicitor's fees; but the difficulty arises from the fact that the motion to dissolve was not specifically passed upon. We find no case in which this exact question had been passed upon. In Lambert v. Alcorn, 144 Ill. 313, on page 329, a motion for the dissolution of the injunction was made but on account of the illness of the judge it was but partly heard and never decided. The court held that if there was any evidence on which to base the allowance of solicitor's fee, it would be allowed. We are of the opinion that the solicitor's fee in this case was properly allowed and upon a review of the evidence we also think that the evidence sufficiently distinguishes the work done upon the motion to dissolve from the work done in the general defense of the case, so that there was no difficulty in determining what should be allowed for services performed in the matter of the motion to dissolve. Appellant insists that the solicitor's fees allowed are not large enough but we are of the opinion that the allowance made by the chancellor was

just and reasonable.

Appellee contends that the suggestion of damages came too late and that it should have been made before the final decree was entered. The original decree made the temporary injunction permanent and therefore no suggestion of damages was then proper. After that decree was reversed by this court and immediately upon the case being redocketed in the circuit court, a suggestion of damages was made and we are of the opinion that this was the first opportunity the appellant had to make such suggestion. It was before the final decree was entered dismissing the bill. For that reason it was in apt time.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of Sept. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 626

BE IT REMEMBERED, that afterwards, to-wit: On 3 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General Number 7112 Ag. No. 10

Frank A. Anderson, et al,

appellees,

vs. Appeal from Will County

Hez B. Nicoles,

appellant,

231 I. A. 626

Jones, J.

The appellees filed a bill of complaint in the circuit court of Will County on April 1st, 1922, praying for a mandatory injunction to restrain the appellant from furnishing at the voting places, ballots to be voted at the election in the town of Joliet on April 4th, 1922, without the names of the appellees thereon as candidates for the various offices to be filled at that election. The facts upon which the bill is predicated are that on March 30th, 1922 the Farmer-Labor Party filed its certificate of nomination of candidates for town offices of the town of Joliet with the appellant who was the town clerk to be voted for at said election. Objections to the certificate were filed on March 29th, 1922 with the Board of town auditors and these objections were sustained on the ground that the word "township" was used in the certificate instead of the word "town". This finding of the board of town auditors under Chap. 46, Section 298, Smith's Statutes, was final. On March 30th, 1922 the Farmer-Labor Party acting through the secretary and chairman of its caucus attempted to file a new certificate with the appellant under Section 397 Chap. 46 of said Statute but the appellant refused to receive the certificate.

The court granted a temporary injunction and on the same day the appellant appeared before the circuit court and moved to dismiss the bill which motion the court denied and from that order the appellant has appealed. On April 3rd, 1922, a petition for an attachment for contempt against the appellant was filed, a citation issued and the appellant appeared, presented his appeal bond in the injunction case and the citation for contempt was dismissed.

General Number 7113

Henry V. Andersen, et al,

Appellees,

vs.

Appeal from Polk County

Noe B. Nicolas,

Appellant.

June 7, 1.

The appellees filed a bill of complaint in the circuit court of Polk County on April 1st, 1888, praying for a mandatory injunction to restrain the appellant from fencing on the north side of a certain highway, which is claimed by the plaintiffs in the bill of complaint to be a road as the direction in the deed of Miller on April 1st, 1863, although the names of the appellees however as complainants the true natural affairs to be stated at such session. The facts upon which the bill is predicated are that on March 8th, 1887 the Hanson-Lyman Valley filed its certificate of incorporation of said corporation for the citizens of the town of Jolley with the appellant who was the owner which is to be voted for at said election. Objections to the certificate were filed on March 29th, 1888 with the Board of town auditors and these objections were overruled on the ground that the word "Township" was used in the certificate instead of the word "Town". Bill finding of the board of town auditors under Chap. 41, Section 907, Miller's Statutes, was final. On March 30th, 1888 the Plymouth-Jolley Plat; fencing through the mountain and obtained a right of way to the Jolley & Ben certificate with the appellant which runs through his property. We do not recite but the appellant refused to receive the certificate. The court granted a temporary injunction but on the same day the appellant entered the closed gate in the middle of the road and took away the gate. On April 3rd, 1888, a petition for an attachment for contempt against the appellant was filed, and the injunction was dissolved.

The only question involved in this case is whether or not the subject matter of the suit only involved political rights such as come within the jurisdiction of a court of law and do not come within equity jurisdiction. In other words the question is whether or not the remedy of the appellees should have been by mandamus in a court of law rather than by a bill for an injunction in a court of equity.

In support of the contention that the remedy is an action at law the appellant cites the case of Fletcher v. Tuttle 151 Ill. 41. In that case the Supreme Court defines the distinction between civil and political rights and holds that political rights must be enforced in an action at law by mandamus and that a court of equity has no jurisdiction over them by injunction. If we were of the view that what is said in that case were applicable to this case it would be conclusive of the question here presented. The facts in this case, however, are that under the statute it was the clear duty of the appellant to file the certificate last presented to him by the appellees. It was not a political question nor one calling for any discretion upon the part of the appellant but it was simply a right of the appellees to have the appellant do exactly what the law required of him, namely, to file the certificate when it was presented to him. His action in refusing to do his plainiduty did not constitute a political question but only the performance of a ministerial duty. (19 Am. & Eng. Ency. Law (1st Ed) p. 478). Although an election was incidentally involved the action of appellant constituted a clear fraud upon the rights of the appellees against which a court of equity will relieve by injunction compelling the appellant to do his full duty as town clerk. (Wright vs. McKinney, 287 Ill. 539)

It also appears that there was no remedy at law for the reason that the election was to be held within such a short time that the five day notice of the issuance of a writ of mandamus required by the statute could not have been given. Appellees either had to apply to a court of equity for relief or they could not obtain any

relief at all. The relief prayed for was to prevent a fraud and no political question was directly involved. The fact that the election has gone by is no reason for reversing the judgment. In the case of People vs. Knoll, 276 Ill. 58, the Supreme Court refused to reverse a judgment where the appellant had delayed the execution of such judgment in mandamus by taking an appeal.

We are of the opinion that the court ruled correctly on the motion to dismiss the bill of complaint and the decree will therefore be affirmed.

Decree affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of Sept. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On AUG 13 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7115 Ag. No. 13

J. P. Detweiller,

Defendant in Error,

vs. Error to Woodford

Jake W. Miller,

Plaintiff in Error

231 I.A. 526

Jones, J.

The defendant in error J. P. Detweiller obtained a judgment by confession for $571.52 in the circuit court of Woodford County on October 28, 1918 against the plaintiff in error, Jake W. Miller upon a judgment note for $500.00 executed December 10th, 1917. Plaintiff in error filed a motion to open up this judgment supported by affidavits. The court granted the motion and gave plaintiff in error permission to plead to the merits in the case. The plaintiff in error filed a plea of the general issue which he later withdrew and then filed three special pleas. The first as finally amended set up that the promissory note declared upon was executed in part payment to the defendant in error for a stallion sold to the plaintiff in error; that the defendant in error warranted the stallion to be sound and a sure breeder; and guaranteed said stallion to get 60% of breeding mares which should be bred to him in foal during the breeding season of 1918 and that the defendant in error then and there undertook and promised the plaintiff in error that if the stallion did not fulfill the conditions of the warranties and representations that the defendant in error would, after a trial of one season, replace said horse with another stallion as good and valuable as the one sold was then and there represented and warranted to be. The plea further avers a breach of the warranty in that the stallion was unsound and that he did not meet the requirements of the warranty concerning his breeding qualities. The second special plea referred to in the pleading as the third amended plea is a plea of recoupment reciting the warranties contained in the preceding plea, breach thereof and averring loss to the plaintiff in error in the expenditure

Docket No. 7112

T. P. Dorsett,

Defendant in Error,

vs.

Jake A. Miller,

Plaintiff in Error.

Jones, J.

of moneys for freight, feed, wages to employees in caring for the horse and loss of income by his failure to respond to the warranty. The last plea tendered the same issue as the first special plea.

The plaintiff in error has relied upon one assignment of error alone and has grouped all of his argument under that assignment. It is, that the court permitted the defendant in error to introduce over the objection of the plaintiff in error, the testimony of the witness Alfred Bertram. It appears from the evidence that Alfred Bertram purchased the stallion from the plaintiff in error just prior to the season of 1921 and owned and used him during that season. The court permitted Bertram to testify to the breeding qualities of the stallion during the season of 1920 upon the theory that such evidence was admissible to show his breeding qualities during the season of 1918 to which the warranty was limited.

We are not prepared to say that the testimony complained of was not admissible. But, whether it was or not the plaintiff in error by his conduct on the trial of the case and by the evidence offered and instructions requested by him and given by the court waived any objection he might have to such testimony. The plaintiff in error offered testimony showing the breeding qualities of the stallion during the seasons of 1917 and 1919 neither of which years was covered by the warranty. A party cannot complain of an error committed against him when it appears that like error has been committed in his favor. (Kuhn v. Eppstein, 239 Ill. 555; Jones v. Sanitary District, 265 id. 98; Supolski v. Ferguson & Lange Co., 272 id. 82). In addition to that, the court gave at the request of the plaintiff in error the following instruction, "You are further instructed that the purpose for permitting the introduction of testimony before you in this case as to the number of mares or per cent of mares which the horse in question got with foal while he was in control of the plaintiff in error Detweiller or in the control of the witness Bertram in the year 1920 is that you might consider the same together with all the evidence in the case and draw therefrom any presumption

that under these instructions you may have a right to draw. . . .". Having assumed the competency of the testimony the plaintiff in error cannot now be heard to say that it should not have been admitted (Shannon v. Potts, 117 Ill. App. 80). Plaintiff in error assigns as error the refusal of the court to give instructions based upon the incompetency of the testimony of Bertram. Having tendered an instruction conceding the competency of such evidence he cannot complain that the court refused an instruction based upon its incompetency. There being no error in this record which authorizes a reversal of the case the judgment of the court below will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 11th day of Sept, in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A 627

BE IT REMEMBERED, that afterwards, to-wit: On AUG 1 3 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7139 Ag. No. 28

Walter J. Pepper,

appellant,

vs. Appeal from Mercer.

James A. Bohan,

appellee,

231 I.A. 627

Jones, J.

Walter J. Pepper commenced an action in debt against James A. Bohan, at the April term, 1921, of the circuit court of Mercer County. The declaration as amended averred that on or about March 17, 1920, the plaintiff executed and delivered to the defendant, a chattel mortgage covering a large amount of property owned by the plaintiff; that the mortgage was given to secure the payment of a promissory note in the sum of $5386.39 executed by the plaintiff to the defendant; that thereafter the defendant foreclosed said mortgage and sold all the property included therein to the highest bidders for the sum of $7,000; that it was the duty of the defendant after such sale to make a statement showing the items of personal property sold, the name of each purchaser and the amount for which each article sold and also an itemized statement of the necessary reasonable expenses incurred in taking, keeping and selling the said property and deliver the same to the plaintiff, the mortgagor in said mortgage, in person or by mail within ten days after said sale in accordance with the provisions of Par. 36 of an Act to regulate the sale of personal property under the power of sale contained in chattel mortgages.

The declaration also averred that the defendant failed to make and refused to make out such a statement in the time required and by reason thereof the defendant became liable to pay to the plaintiff, one third of the value of the property sold by the defendant.

The defendant filed the plea of the general issue and six special pleas. The plaintiff demurred to all of the special pleas and joined issue on the plea of general issue. The court sustained the demurrer

Cemetery No. A139

Burial No. 24

Name: [illegible]

Age:

Born:

Died:

Buried:

James T. Dalton,

Age.

Native of [illegible]

Died, Jan. 2nd,

Buried, Jan. 4th.

Minister C. Dobson.

to the 1st, 2nd, 3rd and 4th special pleas. Since the ruling on them is not involved in a decision of this case no further mention will be made of them. The court overruled the demurrer to the 5th and 6th special pleas and the plaintiff elected to stand by the demurrer. Thereupon the defendant moved to withdraw the plea of the general issue which motion was granted over the objection of the plaintiff and the court entered judgment on the pleadings in favor of the defendant.

The main question before the court then is whether or not the 5th and 6th special pleas presented a good defense to the cause of action, set up in the declaration. The fifth special plea avers as defendant's excuse for not furnishing a statement as required by the statute, that after the sale, plaintiff by and through himself, his agents, and attorneys met with the defendant, his agents, and attorneys, and then and there waived a statement as required by the statute by requiring defendant to furnish plaintiff all such data and figures and facts in person which the plaintiff himself, his agents and attorneys took down in writing. The sixth special plea avers as an excuse for not furnishing a statement as required by statute, that before the sale of the mortgaged property in question and after defendant took possession of the same under the mortgage, and before the sale of said property at the mortgage sale, plaintiff had possession thereof as custodian and prepared such property for sale and attended the sale and assisted in conducting said sale, saw the list of articles sold, made by the clerk of the sale, had an opportunity to examine the clerk's list showing what each article brought and to whom sold and the total amount of the sale and that within ten days after the sale, defendant and his attorney met with plaintiff and his attorney and showed them the amount of the property sold for and a statement showing each item of expense attending the same and the care of the property and how the proceeds were applied upon the indebtedness secured by the mortgage which was a lien upon the property, which items were taken by plaintiff and his attorney and such of them as they desired were written down

and they heard a statement of such items without any objection whatever, that the defendant failed to give them any information plaintiff desired or was entitled to.

It is insisted that the court erred in not sustaining the plaintiff's demurrer to the said fifth and sixth special pleas. We think the ruling of the court was correct. The purpose of the statute in question is to secure to the mortgagor whose property has been sold under a chattel mortgage, full information as to the amount each article sold for, to whom sold, and the items of expense attending such sale. (Robley v. Culwell, 69 Ill. App. 372; Marvell v. McKinzie, 105 Ill. App. 164). It is therefore apparent that if the matters set up in the fifth and sixth special pleas are true, the purpose of the statute has been complied with; at least the plaintiff should not now be heard to say that he did not receive the notice contemplated by the statute.

Since the foregoing is the only assignment of error argued, all others are waived. The judgment of the lower court is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 21st day of Sept. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7135

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 627

BE IT REMEMBERED, that afterwards, to-wit: On AUG [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7135 Ag. No. 35

S. T. Twomey,

appellee

vs.

Minnie Jones,

appellant

Appeal from County Court of Peoria

231 I.A. 629

Jones, J.

The appellee, S. T. Twomey, began suit before a justice of the peace in Peoria County against the appellant, Minnie Jones, to recover the sum of $50 made as a first payment on a contract for the purchase of real estate. There was a judgment for the appellee and the appellant thereupon appealed to the County Court of Peoria County. The appellee again recovered a judgment for $50 in that court from which judgment this appeal was prosecuted.

The evidence shows that on the 22nd day of November, 1920, the appellee and the appellant entered into a written contract under seal for the sale of a house and lot by the appellant to the appellee for the consideration of $1800. Of this amount the appellee paid $50 in cash and by the contract agreed to pay the balance at the rate of $17 per month. The appellant agreed to put in windows, doors, and a floor in the house on said premises and to enclose a porch, put pillars under the house and plaster the cistern. The contract contained the following clause, "And in case of the failure of the party of the second part to make either of the payments, or any part thereof, or perform any of the covenants on his part hereby made and entered into, this contract, at the option of the party of the first part shall be forfeited and determined and the party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and liquidation of all damages by them sustained, and they shall have the right to re-enter and take possession of the premises aforesaid".

S. T. Thomas,

Appellee

vs.

Minnie Berry,

Appellant

Appeal from Peoria County.

Opinion of Court.

Mr. J. T.

The appellee, S. T. Thomas, began suit against appellant in Peoria County claiming the remainder, $1411.10, of the sum of $50 made up of first payment on a contract for the purchase of real estate. There was a judgment for the appellee for the amount claimed to the County Court of Peoria County. The appellee again recovered a judgment for $50 in that court from which judgment this appeal was prosecuted.

The evidence shows that on the 22nd day of December, 1897, the appellee and the appellant entered into a written contract under seal for the sale of a house and lot by the appellant to the appellee for the consideration of $1200. Of this amount the appellee paid $11 in hand and by the contract agreed to pay the balance at the rate of $11 per month. The appellant agreed to put in windows, doors, and a floor in the house on well finished and to enclose a room, and cellar under the house and plaster the inside. The contract contains the following clause, "And in case of the failure of the party of the second part to make either of the payments, or any part thereof, or any of the covenants on his part herein mentioned, or perform any of the conditions on his part herein to be performed, at the option of the party of the first part, this contract is forfeited and determined and the party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and liquidation of all damages by him sustained, and the said party of the first part shall have the right to re-enter and take possession."

Before the repairs could be made and before the first payment of $17 was due on December 8, 1920, the appellee announced that he would not make any further payments on the property and later on the appellant sold the premises to a third party.

While it is contended that the appellant had not performed her part of the contract it is apparent from the examination of the evidence that this objection was never made until after the refusal of the appellee to make further payments and it is further apparent that the appellant ceased making repairs on the house upon receiving such notice. It is contended by the appellee that at the time of making the contract in question the appellant orally agreed that her husband would join in the contract; that if he did she would repay the $50.00 and that he did not sign the contract, thus giving rise to an obligation on her part to repay the money. It is clear that the evidence offered to sustain this contention adds new terms or provisions to the contract.

Under the terms of the contract the money paid was to be retained by the appellant as damages for the failure of the appellee to perform the contract. The terms of this contract, which is under seal, cannot be set aside by the mere parol testimony of the appellee, that the appellant agreed to repay the money which under the contract she had a right to retain. (Armstrong Paint Co. vs. Can Co. 301 Ill. 103): We think the verdict is contrary to both the law and the evidence.

The appellant offered two instructions which the court refused. They should have been given as they announced correct propositions of law, applicable to the case.

The court finds, as a matter of fact, that appellee voluntarily abandoned the contract in question and refused to perform thereunder and that appellant is not indebted to the appellee under the contract and the evidence in this case. The judgment will therefore be reversed.

Judgment reversed with a
finding of fact.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 21st day of Sept. in the year of our Lord one thousand nine hundred and twenty-

Justus L. Johnson

Clerk of the Appellate Court.

7140 (3/4 0)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 627

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7140 Ag. No. 31

George Kegher,

appellee,

vs. Appeal from Kankakee

John B. Cooper,

appellant,

231 I.A. 27

Jones, J.

The appellee, plaintiff below, filed suit in the county court of Kankakee County against the appellant, defendant below, to recover wages claimed to be due him from the appellant under a contract of hiring for one year from October 5, 1920, at $70.00 per month, together with house rent, garden spot, use of cow, two hogs and increased poultry. On April 5th, 1921, the appellant discharged the appellee, who thereupon sued the appellant for his wages for the remainder of the year. Appellee recovered a judgment for $150 from which appellant prosecuted this appeal.

Appellant contends that the appellee cannot recover in this case for the reason that the contract was not to be performed within a year and was therefore void under the statute of frauds and that appellee can only recover for such amount, if any, as may be due for wages actually performed. Appellant also complains of several instructions given on behalf of the appellee.

Rule "16" of this court provides that the abstract shall state in a concise form so much as may be necessary or important of the pleadings, the interlocutory orders and the judgment or decree. The evidence should be given in narrative form so as to present clearly its substance, but questions and answers may be given when necessary to present alleged errors. The abstract must set out in full every instruction given, modified or refused. It must fully present every exception relied upon and every error alleged and also that part of the record which supports the rulings complained of. It must be taken to be accurate and to be sufficient for a full understanding of the questions presented for decision,

Docket No. 7140

In re, &c.

Petition,

&c.

Agent for Petitioner.

Date 2. Docket,

Memo. 1.

unless the opposite party files an additional abstract making necessary corrections and additions. The appellant has failed to comply with this rule in any respect. The transcript of the record in this case consists of 372 pages abstracted into 18½ pages. Of these, five are not abstracted at all but are verbatim copies of the record so that in fact 367 pages of the record are compressed into 13 pages. The part abstracted in full or verbatim is generally most favorable to the appellant. 347 pages of testimony are abstracted into 12 pages. The last 20 pages of the testimony are abstracted into 20 lines. The same method was employed in abstracting all the other testimony in the record so that it is an utter impossibility for this court, from the abstract, to reach an intelligent opinion with reference to the merits of the appellant's appeal. We do not wish, however, to be understood as saying that brevity in the preparation of abstracts is to be condemned. Indeed, abstracts fairly and clearly presenting the issues in small compass are to be commended. But in this case the abstract is so brief and so many essentials are omitted that the case is not presented so the court can pass upon it intelligently.

Three given instructions are omitted from the abstract. One instruction which was refused as tendered but modified by the court and then given is omitted. The first instruction appearing in the abstract is the second instruction appearing in the record. Complaint is made of the second instruction. Whether this complaint refers to the second instruction in the abstract or the second instruction in the record is a matter of conjecture. The same criticism can be made as to every other instruction complained of.

The Supreme Court in the case of Epoch Production Corp. vs. Schuettler, 280 Ill. 310, at pages 315 and 316 say, "Many decisions of this court will be found affirming judgments of the lower court because the abstract furnished was not sufficient to disclose reversible error and this court has refused in several instances to go to the record to search for errors complained of when the abstract did not disclose sufficiently that such errors existed, and to consider

purported abstracts that were literal copies of the record or parts of the record and not abstracts thereof . . . . . We deem it advisable to say in this case for the information of attorneys that this court will enforce its rules of its own motion and inflict the proper penalties therefor by reversing or affirming the same pro forma or entering such further orders as are deemed appropriate by the court."

In the case of Henion vs. Pohl, 115 Ill. App. 100, the court said, "The appellant has failed to file any abstract as is required by the rules of this court; what he has filed is a mere index referring to the pages of the record where various matters may be found. We would be justified in refusing to consider the case for this reason. Appellee has filed no brief but we have nevertheless looked into the record and considered the case upon its merits and are of the opinion the decree should be affirmed."

In the condition of the record above set forth and under the authorities cited, there is nothing we can do except to affirm the judgment.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of Sept in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7146

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 627

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 13 1923
the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7146 Ag. No. 38

People, ex rel, Isaiah Coffman,

appellant,

vs. Appeal from Ogle

W. D. Mackey, County Treasurer, etc.,

appellee,

Jones, J.

Community High School District No. 217 situated in Ogle County, was organized during the summer of 1921. Thereafter on the relation of Isaiah Coffman at the April term, 1922, of said court, a petition for an information in quo warranto was filed to test the validity of the organization of the district. That proceeding was still pending and undetermined at the time of the filing of the bill of complaint herein. Under the facts set up in the bill of complaint, community high school district No. 217 was at least a de facto district and the officers of the district were at least de facto officers.

Pending the hearing on the quo warranto the appellant who is a taxpayer of the district, filed his bill for an injunction, in the circuit court of Ogle County, in which he set up the organization of the district, the filing of the proceedings in quo warranto, the grounds upon which it is alleged that the district is illegal and void and prayed for an injunction restraining the appellee as county treasurer from collecting any taxes levied, pending the final decision in the quo warranto proceedings. The court granted a temporary injunction whereupon the appellee moved to dissolve it. The court entered a decree dissolving the injunction and dismissing the bill, from which decree this appeal is prosecuted. The only question before this court, as stated by appellant, is "Can a court of equity enjoin the collection of taxes levied by the school authorities pending the quo warranto to test the illegality of the organization of the district and can a court of equity enjoin such taxes while and during the pendency of the suit in quo warranto?"

Journal No. 1143 Ct. No. 2

People, on rel, Lewis Coffman,

Appellant,

vs.

P. W. Bailey, County Treasurer, Inc.,

Appellee.

Jones, J.

Community High School District No. 617 situated in Cook County, was organized during the summer of 1920. Thereafter on the relation of Lewis Coffman at the April term, 1923, of said court, a petition for an information in the nature of quo warranto was filed to test the validity of the organization of the district. Such proceeding was still pending and undetermined at the time of the filing of the bill of complaint hereinafter. Under the facts set up in the bill of complaint, community high school district No. 617 was an illegal and void corporation and the officers of the district were at least de facto officers.

Pending the hearing on the quo warranto the complainant, who is a taxpayer of the district, filed his bill for an injunction, in the circuit court of Cook county, to restrain the collection of the taxes levied by the district in the year 1923, the filing of the proceedings in quo warranto, the pendency thereof and the fact that the petition for the writ of quo warranto presented grounds which in its alleged that the district is illegal and void and prayed for an injunction restraining the defendants from collecting any taxes levied, pending the hearing on the quo warranto proceedings. The court granted a temporary injunction against the collection of taxes levied by the school district and the defendants, by their counsel, entered a motion dissolving the injunction and dismissing the bill, from which decree this appeal is prosecuted. The only question involved on this appeal is whether the court had jurisdiction of the parties and of the subject matter.

Since this cause was taken by this court for final determination at the October term, 1923, the Supreme Court of this State has decided this question in the case of Baird v. Community High School District, 304 Ill. 536. In a well considered opinion in which all of the reasons urged upon this court as grounds for the granting of the injunction are fully considered it is held that a court of equity has no power to grant an injunction in such case. The court said, "By the averments of the bill, the community high school district was a district de facto. There was a law under which such a district could be organized and a proceeding under that law for such organization. The law authorized the election of a board of education for such a district, and the bill alleged such an election and that the board elected was at the time the levy was made in actual possession of the office and exercising its powers and functions. In the absence of fraud the acts of officers de facto so far as they affect third persons or the public are as valid as those of officers de jure. Courts of equity will not enjoin such officers or boards from the performance of the functions of their office merely bedause they are not officers or boards de jure."

The court did not err in dissolving the injunction and dismissing the bill. The decree will therefore, be affirmed.

Decree affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of Sept. in the year of our Lord one thousand nine hundred and twenty-three.

Justus L. Johnson

Clerk of the Appellate Court.

The People of the State of Illinois ex rel. Andrew Russel, Appellee, v. Illinois State Bank of Crete et al., on appeal of William Saller, Appellant.

Gen.No.7,107.

1. APPEAL AND ERROR--order allowing receiver of defunct bank solicitor's fees in pending matter, not appealable. An order allowing the receiver of an insolvent bank solicitor's fees for services rendered by the solicitors in a proceeding which is still pending at the time the order was made, the receivership being also pending, is not a final, appealable order.

231 I.A. 627

231 I.A. 627

7107

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 627

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to wit:

39040

231 I.A. 627

The People of the State of Illinois
ex rel Andrew Russel, etc.,

appellees,

vs.

Illinois State Bank of Crete, et al,
on appeal by William Saller,

appellant,

Appeal from the Circuit Court
of Will County

231 I.A. 627

Partlow, P.J.

On January 29, 1920, the People of the State of Illinois on the relation of Andrew Russel, as Auditor of Public Accounts, filed a bill in the circuit court of Will county to liquidate the affairs of the Illinois State Bank of Crete and to appoint a receiver. Henry W. Ohlendorf was appointed receiver and gave bond in the sum of $100,000. On March 29, 1920, a decree was entered to convert the assets into money and to wind up its affairs. He was authorized to prosecute all suits for the collection of assets and to incur whatever expenses were necessary, including attorney's fees. The receiver began a suit in equity in the circuit court of Will county against the directors of the bank to charge them for certain losses due as the result of their alleged failure to properly perform their duties as directors. He employed Charles S. Deneen, W. D. Heise and Roy Massena as attorneys to prosecute the suit. On June 25, 1921, the receiver filed his petition in the original suit for the allowance of a solicitor's fee incurred in the case against the directors. Evidence was taken under the petition and on September 28, 1921, an order was entered allowing a solicitor's fee in the sum of $25,000. From this order William Saller, who claims to be a creditor, has prosecuted this appeal.

Many reasons are urged by appellant why this order should not be affirmed but we deem it necessary to consider only one question presented. The right of appeal is regulated entirely by statute. The General Assembly has the authority to determine in what cases appeals shall be prosecuted. Appeals are generally

the People of the State of Illinois
on rel Isadore Ansell, etc.,

Appellees,

vs. of Will County,

Illinois State Bank of Crete, et al.,
on Appeal by William Baker,

Appellant.

Barton, P.J.

On January 29, 1920, the People of the State of Illinois on the relation of Isadore Ansell, as Auditor of Public Accounts, filed a bill in the circuit court of Will county to liquidate the affairs of the Illinois State Bank of Crete and to appoint a receiver. Henry W. Dhlendorf was appointed receiver and has ever since been in the sum of $100,000. On March 29, 1930, a decree was entered to convert the assets into money and to wind up its affairs. He was authorized to prosecute all suits for the collection of assets and to incur whatever expenses were necessary, including attorney's fees. The receiver began a suit in equity in the circuit court of Will county against the directors of the bank to charge them for certain losses and as the result of their alleged failure to properly perform their duties as directors. He employed Charles S. Dawson, T. B. Heiple and Roy Wasson as attorneys to prosecute the suit. On June 28, 1931, the receiver filed his petition in the original suit for the allowance of a solicitor's fee incurred in the suit against the directors. Affidavits was taken under the petition and on July 18, 1932, an order was entered allowing a solicitor's fee in the sum of $25,000. From this order William Baker, who claims to be a creditor, has prosecuted this appeal.

Many reasons are urged by appellants why this order should be reversed but we deem it necessary to consider only one proposition presented. The right of appeal is regulated entirely by statute. The General Assembly has authority to determine in what cases appeals shall be prosecuted. Appeals are purely

prosecuted only from final judgments, orders and decrees, and yet there are exceptions to this rule, and under statutory provisions appeals may be prosecuted from interlocutory orders. Section 9I, chapter IIO, provides that appeals shall lie to and writs of error from the Appellate or Supreme Court, as may be allowed by law, to review the final judgments, orders or decrees in any suits or proceedings at law or in chancery. Under this section there can only be appeals to review final judgments, orders and decrees. Section I23, chapter IIO, provides for appeals from interlocutory order granting injunctions, or overruling motions to dissolve the same, but this case does not come within section I23. These are the statutory provisions regulating appeals, and the question therefore arises whether this order allowing a solicitor's fee is a final order such as would entitle appellant to appeal therefrom.

By the modern practice, on the final hearing of a suit in chancery, all previously rendered decretal orders are before the court, and may be altered, modified or vacated as justice may require. Gibson v. Rees, 50 Ill. 383; Jeffery v. Bonbon, 167 Ill. 375; Price v. Springer, 241 Ill. 230; Weil v. Mulvaney, 262 Ill. I95. For this reason it is unnecessary that there should be an appeal from each order entered in a case. A party cannot appeal his case by piecemeal. The case must generally be finally disposed of in the court below before either party can appeal and assign errors. A judgment or decree is only final and appealable when it terminates the litigation between the parties on the merits of the case so that, when affirmed, the court below has only to proceed with the execution of the judgment, or decree. Hunter v. Hunter, I00 Ill. 519; Sholty v. Sholty, I40 Ill. 8I; Chicago & Northwestern Railway Company v. City of Chicago, I48 Ill. I4I; Rosenthal v. Board of Education of Chicago, 239 Ill. 29; People v. Drainage Commissioners, Union Dist. No. 1, 282 Ill. 5I4; Peabody Coal Company v. Industrial Commission, 287 Ill. 407; People v. Village of Niles Center, 306 Ill. I45.

The question whether an order is final has been before the courts on many occasions. In Dalton v$. Zimmer, I3I Ill. App. 490, an order was entered fixing the compensation of a receiver and his attorney and ordering payment out of funds in the hands of the receiver. It was held that this was not a final appealable order for the reason that the case in which it was entered remained in the court with many questions undetermined. In Hecht v$. Kaestner, I07 Ill. App. 252, a receiver was authorized to pay $400.00 for auditing the books, and $I2.30 for a copy of the report. The case was still pending in the court undetermined and it was held that this order for the payment of these sums was not a final order from which an appeal could be prosecuted. In Symms v$. Jamieson, II5 Ill. App. I65, an order allowed a master, to whom the case had been referred, certain fees and an attempt was made to appeal from that order. It was held that the order was not separable from the cause itself and was not in and of itself a final order from which an appeal could be prosecuted. In India Rubber Co. v. C.J. Smith & Co., 75 Ill. App. 222, an order directed a sheriff to turn over to a receiver property in his hands which he had levied upon under an execution and it was held that this was only an interlocutory order from which an appeal could not be prosecuted. In Meyer v$. City of Decatur, I34 Ill. App. 385, a judgment for costs was entered against the petitioner in a mandamus proceeding and it was held that this was not a final and appealable order, and that before it could become a final appealable order it must appear from the order that the petition was dismissed. In Crane v$. Jewell, 72 Ill. App. I58, the order was in a chancery suit for the surrender of certain funds by a receiver to another officer of the court. The order was made expressly without prejudice to an accounting pending before the master and concluded with an intimation that if the order was not complied with by a certain day the court would treat the receiver as in contempt. It was held that this was not a final order from which an appeal could be prosecuted. In Chicago Portrait Co. v$. Crayon Co., 2I7 Ill. 200, a judgment was entered sustaining a demurrer to the

declaration, but no order was entered adjudging that the plaintiff take nothing by the writ, or that the defendant go hence without day, or words of equivalent meaning. It was held that this was not a final order from which an appeal would lie.

The suit in which the receiver was appointed at the time the order in question was entered was still pending and undetermined in the circuit court of Will county. On the final hearing all previously rendered decretal orders will be before the court for consideration and they may be altered, modified or vacated, as justice may require. Even the suit in which the services were rendered, for which the allowance was made, was still pending and undetermined at the time the allowance was made, and services were rendered after that date for which compensation will probably be asked. The court, at any time before the final hearing, may make such orders concerning the allowance of these solicitors' fees as may be deemed just and right under the law and the evidence. The order in question did not terminate the litigation between the parties on the merits of the case so that, when affirmed, the court below had only to proceed with the execution of the order. The order was not even intended to be in full of the solicitors' fees, but was merely a payment on account.

Under the facts presented and the authorities cited, this order was not a final order from which an appeal can be prosecuted and for that reason the appeal will be dismissed.

Appeal dismissed.

390 47

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of Oct. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 628

BE IT REMEMBERED, that afterwards, to-wit: On SEP 7 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

I

7170. Ag. 7.

Metal Stampings Corporation,

Appellant,

vs.

Ralph Houltram, et al,

Appellees.

Appeal from Livingston County.

231 I.A. 628

Partlow, P. J.

Appellant, the Metal Stampings Corporation, filed its bill in the circuit court of Livingston county against the six appellees and others, in which it sought by injunction to restrain them from interfering with the business of appellant and its employees, and from unlawfully picketing its factory. The defendants named in the bill were the former employees of appellant who were on a strike, the union to which they belonged known as Federal Labor Union No. 17317, and the officers and members of the Streator Trades and Labor Council, including William Atkinson, its president, Thomas Kelly, vice-president, R. G. Soderstrom, reading clerk, Benson Forster, treasurer, Jess Blakemore, financial secretary, and Patrick Halpin, guard. Notice of the application for the injunction was given and a temporary injunction was issued. Each group of defendants moved to dissolve the temporary injunction and the officers of the Trades and Labor Council filed affidavits in support of their motion. Appellant asked the court to have the motion to dissolve heard on oral evidence and refer the cause to the master to take the proof, which was done. The chancellor ruled that the appellant had the burden of proof and should take its evidence first and thereafter the defendants should present their proof. The evidence was taken and the master reported it to the chancellor. The chancellor entered a decree making the injunction

permanent against the former employees of the appellant and against Federal Labor Union No. 17317, and dissolved it as to the officers and members of the Trades and Labor Council. The six officers of the Trades and Labor Council filed their suggestion of damages and the chancellor allowed them $2662.38 as damages, and from that decree an appeal has been prosecuted.

No complaint is made of that part of the decree which made the injunction permanent as to the officers and members of Federal Labor Union No. 17317. It is apparently conceded by Federal Labor Union that this part of the decree is sustained by the evidence. No error is assigned because the injunction was not made permanent as to the Trades and Labor Council. The only errors assigned are by the appellant and relate to the six persons above named who were made defendants as officers of Streator Trades and Labor Council.

The specific charge in the bill is that all of these defendants conspired to injure the business of the appellant. There are over two thousand pages of evidence and it will be impossible to set out all of the facts. In support of the contention of appellant, the evidence shows that it was engaged in manufacturing carpet sweepers, card tables, music stands, gas heaters and other wood and metal specialties. Its factory was in the north part of Livingston county a short distance south of the city of Streator, and it employed about one hundred fifty persons. For three years prior to January 21, 1922, it had operated its factory as a closed shop and its employees were members of Federal Labor Union No. 17317. On December 27, 1921, appellant and eighteen other manufacturers in and near the city of Streator published a notice in the daily papers to the effect that upon the expiration of their several contracts with the various labor unions their plants would run as open shops.

The Streator Trades and Labor Council consisted of delegates from each of about thirty labor unions in Streator including Federal Labor Union No. 17317. On the same date the notice was published by the manufacturers, Federal Labor Union adopted a resolution to appoint a picketing committee and they began picketing appellant's plant on January 3, 1922. At first there were only three or four pickets on duty. The Trades Council held a special meeting about that time to consider the open shop. Thomas Kelly was sent to Chicago to secure a speaker to discuss the question at issue. The secretary was instructed to wire President Gompers asking him to give his personal attention to the Streator situation. The matter of placing all of the signers of the open shop declaration on the unfair list was referred to the grievance committee. A committee was selected to write a reply to the manufacturers' announcement.

The number of pickets was increased from day to day, but there was no violence until after the publication of the Trades Council's reply. On January 9, 1922, the Trades Council published in the newspapers its reply which is referred to in the record as the "we fight" article. On the following night delegates from the Trades Council addressed a meeting of Federal Labor Union No. 17317. On January 14, the number of pickets was increased to seventy-five and it is claimed there was some intimidation and trouble. On the afternoon of January 17, several hundred persons assembled in the highway in front of appellant's factory about quitting time and assaulted some of the employees as they were leaving the factory, including Francis C. Mason, the superintendent. That night at a meeting of the Federal Labor Union No. 17317, three delegates from the Trades and Labor Council made speeches. Among them was Thomas Kelly and in the course of his remarks it is claimed he said that Mason got what was coming to him and that Chumbuck, the vice-presiden

The Steuben Trades and Labor Council consisted of delegates from each of about thirty labor unions in the Steuben Federal Labor Union No. 17317. On the whole the unions were friendly, but there was considerable competition for members, and each union had its own special interests to look after.

Thomas Kelly was sent to Chicago to secure a charter to organize the open shop. The question at issue. The secretary was instructed to write a letter to the president requesting him to give his personal attention to the matter of placing [illegible] on the unfair list. The matter of placing [illegible] on the open shop fight rested on the unfair list was referred to the grievance committee. A committee was selected to write a reply to the manufacturers' announcement.

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and general manager, ought to get the same. On January 18, three persons, one of whom was not a member of the union, created a disturbance on the highway in front of the factory and were arrested. They were taken to Pontiac and upon a trial by jury were fined for disorderly conduct, thereupon it is claimed, the president of the Federal Labor Union gave to J. N. St. Clair, who was supposed to be the treasurer of the Trades Council, money of the union to pay the fines, and St. Clair went to Pontiac and paid them. At quitting time on January 18, several hundred pesons assembled along the highway including it is claimed, officers and members of Federal Labor Union. Sixteen deputy sheriffs tried to maintain order. When the employees started home they were threatened, assaulted and showered with bricks and rocks. The deputy sheriffs were assaulted and some of them were injured.

On January 19, the factory was shut down and remained closed for a week. Appellant filed its bill on that date. When notice of the application for the injunction was served on Thomas Kelly, he is reported to have said, "I know what it is. It's no use. We are going through with it. We are not kidding this time." On January 22, the Trades Council appointed a committee to raise funds to pay attorneys to defend those served with the restraining order, and the American Federation of Labor was requested to send Emmett Flood to Streator to help defeat the open shop program. Flood went to Streator and addressed the Trades Council. In company with Kelly and St. Clair, he attended a meeting of Federal Labor Union No. 17317 and stated that an injunction had been issued in a labor case in Muscatine, Iowa; that they filled the jail with men who violated the injunction; that the jail was so full they could not keep them all in, so they had to let them out, and the union won the strike and the injunction did not amount to anything. It is claimed that Kelly, about the time the deputy sheriffs were sent

to the factory, stated that it was foolish for the manufacturers to send eighteen or twenty deputies to Streator when there were eighteen hundred men there who held hunting licenses, and that a similar remark was made by St. Clair. On January 24 Federal Labor Union donated $100.00 to the defense fund committee and the money was paid to St. Clair, treasurer of the Trades Council. Kelly is alleged to have said that appellant had two scab firemen; that the members of the union would not choke out the fires but that they could choke off the firemen.

This is the principal evidence tending to sustain the charge of conspiracy upon which is based appellant's bill for a permanent injunction against the six appellees. The question is whether this evidence was sufficient to justify making the temporary injunction permanent. The first step taken by appellant and the other manufacturers towards an open shop was the statement published in the Streator papers on December 20, 1921. This article was signed by all of the manufacturers interested, including the appellant, and notified all employees and unions that the signers of the document intended to operate open shops and gave the reasons for so doing. As soon as this document was published, steps were taken by the unions to counteract its effect and to resist the movement which was thereby started. Meetings were called of Federal Union No. 17317 as well as the Trades and Labor Council. It will not be necessary to consider the evidence against Federal Labor Union No. 17317 and its officers and members because their action is not involved upon this appeal. All we are concerned with is the evidence against the six officers of the Trades Council who are the appellees here. The Trades Council called a meeting to discuss the question at issue. A speaker came from Chicago. Steps were taken to place the signers of the open shop article on the unfair list, and a committee was appointed to reply to the manufacturers' announcement

This committee made its report soon thereafter, which report answered the article previously published by the manufacturers and stated the facts of the controversy from the union standpoint. This article was not directed against the appellant, but was the answer of the labor unions to the declaration for an open shop as made by all of the manufacturers. Several times the phrase "we fight" was used in the article. Appellant insists that this phrase meant personal violence and was used for the purpose of urging personal violence by the strikers and as a result thereof personal violence was used. On the other hand appellees insist its only meaning and purpose was to indicate that the unions would resist the open shop policy by every lawful means at their command. While it may be true that some unwise statements were used in the article, its publication alone did not establish the charge against the appellees. The article was not signed by appellees but was signed by the Streator Trades and Labor Council and gave the names of the various crafts affiliated with the council. The council was not an incorporated body and only acted through its officers and members. ~~There is very little, if any, evidence which has been called to our attention showing that any of the six appellees wrote the article, had it published, or in fact had anything to do with its production or publication. Substantially the only evidence connecting any of these six appellees with this article was that some of them were officers of the Trades Council. As officers of the Trades Council they~~ appellees had a right to be in sympathy with the strike and to do any lawful act for its success. As long as they violated no law they should not be restrained by injunction. As far as Jesse Blakemore and Patrick Halpin were concerned, the evidence shows that neither of them was an officer or member of the Trades Council at the time the injunction was issued, and the former was not a member of any union. This fact was found by the chancellor,

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enhanced the article previously published by the [illegible] and
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While article was not directed against the specific, but [illegible]
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the appellees. The article was not signed by appellees but was
signed by the Director Trades and Labor Council and was the mouth
of the various crafts affiliated with the council. The council was
not an incorporated body and only acted through its officers and
[illegible]
[illegible]
[illegible]

the finding is amply sustained by the evidence, and for that reason the decree must be affirmed as to these two appellees. Atkinson, Soderstrom and Forster were officers of the Trades Council. Soderstrom wrote the "we fight article" and all three of them voted for it. There is very little, if any, evidence that any one of these three was guilty of any other act which would subject him to the operation of the injunction. They did not visit appellant's plant, or help picket it, or advise others to do so, or urge acts of violence, but on the contrary there is evidence that some, if not all of them, advised against violence of any kind and urged the members to obey the law. In this condition of the evidence the chancellor did right in dissolving the injunction as to these three appellees. There is more evidence against the appellee Thomas Kelly than there is against the other five appellees. The principal things charged against him have been set out above. He has specifically denied all these charges with possibly one exception, and he is corroborated to a certain extent as to each of them by other witnesses. He had a right to advocate the union cause, to make speeches in favor of it, to be active in its affairs and to do any lawful act to favor the strike. A few of the things charged against Kelly could be classified as unlawful. Several of the remarks charged against him should not have been made, while other remarks did not imply a desire on his part to violate the law or induce others to do so. Unless the finding of the chancellor is against the weight of the evidence it is our duty to affirm the decree as to him. Our attention is called to various acts of St. Clair and other members of the Trades Council which is is urged justify the injunction. As the assignment of errors only relates to the six officers of the Trades Council the acts of other members and officers are not properly before us. From a consideration of the whole evidence we are of the opinion that the chancellor properly dissolved the injunction as to the six appellees.

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finding of the chancellor is against the weight of the evidence it
is our duty to affirm the decree as to him. Our attention is called
to various acts of St. Clair and other members of the Trades Council
which is urged justify the injunction. As the enjoinment of
errors only relates to the six officers of the Trades Council the
acts of other members and officers are not properly before us.
From a consideration of the whole evidence we are of the opinion
that the chancellor properly dissolved the injunction as to the
six appellees.

Error is assigned upon the action of the chancellor in assessing damages. The items assessed are as follows; $1775.00 as solicitor's fees; $504.45 as master's fees for taking the evidence on behalf of appellees; $264.75 for a copy of evidence, and $118.18 for procuring witnesses, making a total of $2662.35. The principal objection to this allowance is that it was not for labor performed in procuring a dissolution of the temporary injunction but was for all the services performed upon the final hearing of the case. It is undoubtedly the law as contended by appellant that the damages allowed should only be such as were necessarily incurred upon the motion to dissolve the temporary injunction. (Lambert v. Alcorn, 144 Ill. 313; Milligan v. Nelson, 188 Ill. 139; Landis v. Wolf, 206 Ill. 393; Hillmer v. Behr, 196 Ill. App. 363). The evidence however, shows that when the motion was made by the appellees to dissolve the temporary injunction, they presented affidavits in support of their motion. Thereupon the appellant made a motion to refer the hearing on the motion to dissolve to the master and allowed each party to present such oral evidence as he might see fit. As a result of this motion a great mass of evidence was taken on behalf of the appellant. If the motion had been heard upon affidavits and had been confined to the question at issue, very little expenses would have been necessary. There were two solicitors representing the defendants, one representing the six appellees and the other representing the other defendants. The solicitor representing the defendants other than appellees was not present much of the time during the hearing. The solicitor representing the six appellees was present all of the time the evidence was being taken which was about seventeen days. The sessions were held from about 9 o'clock in the morning until 9 o'clock at night. It was necessary that this solicitor should be present all of this time for the reason that he had no way of

error is assigned upon the motion of the Commissioner in assessing damages. The items assessed are as follows; $177.00 as solicitor's fees; $304.45 as Master's fees for taking the evidence on behalf of appellees; $864.40 for a copy of evidence, and $113.75 for procuring witnesses, making a total of $1558.20. The refusal of objection to this allowance in that it was not for labor performed in procuring a dissolution of the temporary injunction but was for all the services performed upon the final hearing of the case. It is unquestionably the law as contended by appellant that the damages allowed should only be such as were necessarily incurred upon the motion to dissolve the temporary injunction. (Mathers v. Altvater, 144 Ill. 318; Milligan v. Nelson, 185 Ill. 150; Dennis v. Wolf, 206 Ill. 393; Hillmer v. Bear, 186 Ill. App. 669). The evidence however, shows that when the motion was made to dissolve appellees to dissolve the temporary injunction. Many pressure affidavits in support of their motion. Thereupon the appellant made a motion to refer the hearing on the motion to dissolve to the master and allowed each party to present such oral evidence as he might see fit. As a result of this motion a great mass of evidence was taken on behalf of the appellant. If the motion had been based upon affidavits and had been confined to the question at issue, very little expense would have been necessary. There were two solicitors representing the defendants, one representing the six appellees and the other representing the other defendant. The solicitor representing the interests other than appellees was not present much of the time during the hearing. The solicitor representing the six appellees was present all of the time the evidence was being taken which was about twenty days. Of sessions were held from about 9 o'clock in the morning until 4 o'clock at night. It was necessary that this solicitor should be present all of this time for there was a need of

knowing at what time evidence would be offered effecting his clients, and he should be paid what his services were reasonably worth. In addition to the seventeen days in court and before the master, this solicitor worked ten days in his office. He was allowed $75.00 per day while in court and $50.00 per day in his office. The fees allowed were sustained by the evidence and there is no proof that they were unreasonable. The appellees were required to advance their costs to the master before the evidence was reported. They expended $118.18 for procuring witnesses, and as there were over 2000 pages of evidence it was necessary to have a copy of the evidence. The chancellor found that all of the amounts allowed were necessarily expended by appellees to secure the dissolution of the temporary injunction and this finding is sustained by the evidence. The condition in which we find this record was brought about by the action of the appellant, and we are of the opinion that the damages allowed by the chancellor were proper and should be sustained.

We find no reversible error and the decree will be affirmed.

Decree affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 28th day of Oct. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 628

BE IT REMEMBERED, that afterwards, to-wit: On 923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Musette Goff, Anx. of the Estate
of Henry F. Goff, Deceased,

Appellee

vs.

Chicago, Burlington & Quincy
Railroad Company,

Appellant.

Appeal from the Circuit
Court of Knox County.

231 I.A. 628

Partlow, P. J.

The appellee, Musette Goff, as administratrix of the estate of Henry F. Goff, deceased, in the circuit court of Knox county, obtained a judgment against appellant, the Chicago, Burlington & Quincy Railroad Company for $25000, for the death of Henry F. Goff. $12000. was paid to the widow, Musette Goff and the balance was to be divided equally between Lee Goff, ~~of~~ a son of the deceased, and Mabel Goff, a daughter. An appeal has been prosecuted to review the judgment.

For a number of years the deceased, Henry F. Goff, had been a freight brakeman in the employ of appellant. On the night of October 24, 1921, a freight train was made up in the yards in the city of Galesburg, Knox county. It consisted of twenty-nine cars and included four or five cars of live stock from Iowa. The trip was to be from Galesburg to Clyde, then through Hawthorne to the Union Stock Yards in Chicago, where the live stock was to be unloaded, and then the empty cars were to be taken back to Hawthorne which was the end of the trip. The train crew consisted of an engineer, fireman, conductor, head brakeman and the rear brakeman, who was Goff. Between Galesburg and Clyde other cars were picked up so that when the train reached Clyde it consisted of about forty cars of live stock and seventeen

Partlow, R. C.

cars of dead freight. The seventeen cars of dead freight and five cars of live stock were set out at Clyde and Hawthorne which are about a mile and a half apart, leaving thirty-five cars of live stock for the Union Stock Yards including the four or five cars from Iowa. The train proceeded over the tracks of the Pennsylvania Railroad and the Chicago Junction Railroad to the Union Stock Yards to platform No. 5, which was long enough to hold about forty cars, where it arrived at about four o'clock on the morning of October 25, just before daylight. Immediately north of platform No 5 was an unloading track, north of the unloading track was a lead track, and north of the lead track was a main, or running track. The train backed in from the lead track onto the unloading track to platform No. 5, and was headed east with the caboose on the west end. The head brakeman uncoupled the engine, took it back to the rear of the train and coupled it on to the caboose, so that when the empty train started west back to Hawthorne yards the engine was at the front end moving backward. Next came the caboose, followed by the other cars, the last of which was a freight car. It was Goff's duty to ride the last freight car and to put two red lights and one white light on the rear end of this car. On this last car there were four ladders, two at the northwest corner and two at the southeast corner. There was a ladder on the side and one on the end of each of these corners. On the roof, at the top of each ladder, was a grab iron about twelve inches from the edge. These two grab irons came together and made two sides of a square on the roof. There was a running board twenty inches wide in the center of the roof extending the entire length of the car.

After the train was unloaded, it was started west from the unloading platform. The conductor and head brakeman got into the

caboose where they remained until after the accident. Goff waited until the rear car came up to him, when he started to climb up the car. He had a lighted lantern in his hand. When he got to the top of the car he either fell or was jerked off, striking his head on the rail where the frog of a stub track crossed the southrail of the unloading track. He was so severely injured that he never regained consciousness and died in a hospital in Chicago within twelve hours of his injury.

The principal ground of reversal urged is that the evidence does not sustain the verdict, but on the contrary it is contended that the preponderance of the evidence is so overwhelmingly in favor of appellant that the judgment should be reversed. The declaration was under the Federal Employers' Liability Act and, as originally drawn, charged negligence generally on the part of appellant. An additional count filed later charged that the servants of the appellant caused the train to be jerked with great and unusual suddenness, force and violence, and by reason ~~of~~ thereof Goff was jerked off of the rear car and was killed. While there were two counts upon which the case went to the jury, there is in fact but one ground upon which it would be possible to sustain the verdict, namely, that the train was so suddenly and violently jerked as to throw Goff from the car on which he was standing.

It was about six o'clock in the morning and just getting daylight when the train was unloaded and the crew started back to Hawthorne yards, which was about seven or eight miles west, and was the end of the trip. Immediately west of platform No. 5 was a complicated network of switches and tracks over which many trains were being operated in different directions. It was necessary that this train should get the right of way at these various switches before it could proceed. Its speed for that

reason had to be very slow and the engineer and fireman were constantly on the lookout for signals. It was customary to approach a switch slowly and if the switch tender gave the signal to go ahead the train was not stopped, but if no signal was given a stop was made at each switch. The engineer testified there were three switches from platform No. 5 to the place of the accident which was about forty car lengths or 1600 feet west of platform No. 5. The engineer received a signal to go ahead before he reached the first two switches, and for this reason the train did not have to slacken its speed until just before the third switch was reached. As he approached the third switch he shut off the steam which slackened the speed slightly and caused the train to coast about thirty feet, but before he made any effort to stop he received the signal to go ahead and did so. For this reason it is contended there was no sudden jar or jolt just before the third switch was reached which was about the place of the accident. Shortly after the engine passed the third switch, the air brakes were set and the train stopped. The evidence shows that the train did not exceed six miles per hour in this distance. Running a train over switches and tracks such as these and increasing and decreasing the rate of speed, would of necessity cause more or less jerking and bumping as the train started, stopped, or slackened speed. There could, however, be no recovery because of the usual and ordinary jerking, bumping and jolting. These were mere incidences to the employment. Goff had been in this yard and over these tracks and switches two or three times a month for two years. He knew of these usual and ordinary conditions and there could be no recovery on account of any operation of the train in the usual and ordinary manner. The negligence charged is that the train was jerked with great and unusual suddenness, force and violence, and by reason thereof,

he was jerked from the train and killed.

The engineer, fireman and conductor, all of whom were on the front end of the train about 1400 feet from where Goff stood, testified positively that there was no jerking as alleged in the declaration, but that the train ran as smoothly as it usually and ordinarily ran. None of these three men saw the accident or knew just when it happened. There was, however, one eye witness, Bennett, the engineer of a Chicago, Milwaukee and St . Paul train which was standing on a trak just south of the track occupied by this train, and was waiting to follow the Burlington train out of the yards. Both trains were headed west and the rear of the Burlington train was only thirty or forty feet west of the St. Paul train. Bennett was a witness called by the appelee and apparently was disinterested. He testified that he saw Goff at and just before the time of the accident. Goff had a lighted lantern in his hand and climbed up the ladder at the southeast corner of the last car. When he got to the top of the car he stooped over, got hold of the grab iron with one hand, got both feet on the roof and while in a stooped position, stepped to the east and fell. Bennett testified there was no unusual jerking just prior to or at the time of the accident which caused Goff to fall and that he did not know what caused him to fall. At that time the train was moving so slowly that Bennett jumped off of his engine and ran 125 to 150 feet, caught the train and set the air. The speed of the train could not have been very great or he would not have been able to have overtaken the train.

There is only one witness upon whose testimony this verdict can be sustained and that is the head brakeman, Hart. He testified that as the train started west he and the conductor got into the caboose. After the train had gone about 35 or 36

he was jarred from the train and killed.

car lengths he testified there was an unusual jerking of the train. It almost came to a stop and then started with an unusual jerk. He testified he was thrown against the conductor and the conductor was thrown against the rear door of the car. All of this is denied by the conductor, who testified there was no unusual jerking or jarring just before the train was stopped. Even if there was a jerk or jar as testified to by Hart, there is nothing to show where Goff was at that time or that it caused his fall. If this was not the jerk which caused him to fall, the fact that there was a jerk was immaterial. Hart further testified that within about 100 yards after this jerk the air was set, the train was stopped and he and the conductor went back to the rear car. Some stress is placed by appellee upon the fact that Hart testified that when they met Bennett he said a man had been jerked off of the top and injured. Bennett testified he said a man had fallen off of the top. One used the word jerked and the other used the word fallen. Hart testified he found two lanterns on top of the rear car. One of them was on its side in the square formed by the grab irons and had burned out. The other was on the running board near the center of the car, was lying on its side and was burned out. He testified he thought both of these lanterns were red. Some importance is attached to the position of these lanterns by respective counsel. It was the duty of Goff to place two red and one white lanterns on the end of the rear car. Counsel for appellee insist that this evidence of Hart indicates there was a jerk sufficient to overturn both of these lanterns, while cousel for appellant insist that if there had been such a jerk it would probably have been sufficient to have knocked the lanterns off the car. The evidence as to how many red lanterns, if any, were on the rear car is very indefinite and uncertain and depends almost entirely upon the testimony of

Hart. Bennet testified that as Goff went up the ladder he had a white lantern in his left hand, but he did not testify to seeing any lantern on the car just before or just after the accident. The conductor testified there was a lantern on the rear car four or five feet from the rear end, but that it was Goff's white lantern. Our attention has not been called to any other witness who testified to seeing any red lantern either before or after the accident. If the lantern which was found belonged to Goff, then it may have been knocked over at the time he fell, and not have been knocked over by reason of the jerking of the car. In this uncertain condition of the evidence very little importance can be attached to the evidence relative to the lanterns or their position after the accident.

Hart is contradicted on almost every material point by one or two witnesses. He is not only contradicted but the evidence shows he made statements out of court at variance with his statements on the trial. Within a few hours after the accident he made a written statement to appellant in which he said nothing unusual happened until the air was cut in and the train came to a stop; that there was no jerk or jar of the train before that time; and that there was no negligence on the part of any one which contributed to the accident. Hart was a witness before the coroner and testified that before the air was set there was no slacking up of the speed more than was usual; that it was just an ordinary slacking of the speed. Hart and counsel for appellee seek to explain the reason why these contradictory statements were made by him, but after these explanations have been fully made, the fact remains that Hart testified to an unusual jerk which is the basis of appellee's cause of action and a few hours after the accident stated there was no unusual

and a few hours after the accident ended there was no unusual jerk which is the basis of Cynthia's hope of having been fully made, the fact remains that Hart testified he saw a white lantern in his left hand, but he did not testify to seeing any lantern on the car just before or just after the accident. The conductor testified there was a lantern on the rear car four or five feet from the rear end, but that it was Wolf's was not lantern. Our attention has not been called to any other witness who testified to seeing any red lantern either before or after the accident. If the lantern which was found belonged to Wolf, then it may have been smoked over at the time he fell, and not have been smoked over by reason of the jarring of the car. This uncertain condition of the evidence very little importance can be attached to the evidence relative to the lanterns or their position after the accident.

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jerk of the train. Our attention is called to a certain statem made by the conductor to Forsee, a brother of Mrs. Goff, relative to a red lantern on the rear car. This evidence was afterwards withdrawn and is not before us. Also to a statement made by the conductor to Mrs. Goff relative to the liability of a man on the car being jerked off. There are certain other items of evidence which we have considered which it will be impossible for us to mention in detail.

The question is whether this evidence is sufficient to support this verdict. The burden of proof was upon the appellee to prove her case by the preponderance of the evidence. The questions at issue were for the jury to determine. Where there is evidence from which the jury could have found the occurrences as alleged, the judgment will not be disturbed. It is not sufficient to reverse a case that the evidence is in conflict. McKey vs. Esther, 157 Ill. App. 168; Wickert vs. Crosthwait, 163 Ill. App. 586; Greenwald vs. Weinberg, 174 Ill App. 349. Although the trial judge, if sitting as a juror, might not have consented to the verdict sought to be set aside, or, if trying the same case without a jury might have found differently on the same facts, will not justify setting aside a verdict. Schneeweisz vs. Illinois Central Railroad Company, 196 Ill. App. 248. If the verdict, however, is clearly against the weight of the evidence, or if the preponderance of the evidence is in favor of the defendant it is the duty of the reviewing court to set aside the verdict. Fitzgerald vs. Chicago & Erie Railroad Company, 144 Ill. App. 100; Bradley vs. Palmer, 193 Ill. 15; McGovern vs. McGovern, 282 Ill. 97.

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Moley vs. Rattner, 137 Ill. App. 168; Wiemert vs. Oconomowit, 165

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the abstract, but we have also read it carefully as it appears in the record. This verdict must of necessity depend largely, if not entirely, upon the evidence of Hart. Take his evidence out of the case and there is positively nothing left on which to sustain the cause of action. Hart is not only contradicted on almost every important point, but he has made statements out of court so contradictory to his statements in court that the force of his evidence is very much weakened. We do not think the evidence is sufficient to support the verdict, and for this reason the judgment will have to be reversed.

With the evidence in this condition it was of the utmost importance that the jury should be clearly and accurately instructed as to the law. The twenty-fifth instruction given on behalf of appellee attempted to inform the jury as to the measure of damages. It correctly told the jury that it was a mere matter of pecuniary loss, and that they could not allow anything for the grief or anguish of the wife or children by reason of the death. It then proceeded to say that the jury should include the value of the support and protection by the deceased of his wife and children. Loss of support was a proper element of damages but the loss of protection except as the term might be included within the pecuniary loss was not an element of damage and the word protection should not have been used. The instruction then stated that the limit of the total compensation was such a sum as being put at interest will, each year, by taking a part of the principal and adding to the interest yield an amount sufficient for such support of the wife and children during the time the deceased would probably have lived, as he would have furnished had he lived. We think this part of the instruction is awkwardly drawn, does not clearly state the rule and was calculated to confuse or mislead the jury. The jury was not told what rate of

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interest to figure and without some rate being used the instruction could not have been of very much benefit to the jury. For these reasons this instruction should not have been given.

It is insisted by appellant that the evidence does not show that at the time of the injury that Goff was engaged in interstate commerce. This contention is based upon the theory that after the cars were unloaded he was no longer engaged in interstate commerce as he went with the train back to the Hawthorne yards. We don not think this contention can be maintained. It is conceded that at the time this train was made up in the Galesburg yards there were four or five car loads of cattle from Iowa. The mere fact that these cars had gone into the yards at Galesburg and were transferred nto another train did not change the character of the shipment from an interstate shipment, and they continued as interstate shipments until the Union Stock Yards were reached. The track upon which the cars stood at the time they were unloaded was not the track of the appellant but belonged to the Chicago Junction Railroad Company. It was impossible for the crew to leave the train upon this track, and the end of their journey was not reached until they arrived at Hawthorne yards. It has been held under similar circumstances that after interstate cars have been unloaded and while they are being taken to the place in which they are to be stored, and even while the employees are on their way home after having been engaged in interstate shipments, that the men so employed come under the Federal Employers' Liability Act. This court is committed to that doctrine and so held in Jeneary vs. Chicago and Interurban Traction Company, 225 Ill. App. I22, and the same doctrine was announced by the Supreme Court in Chicago Junction Railroad Company vs. Industrial Board, 277 Ill. 512, and Cleveland, Cincinnati, Chicago & St. Louis Railroad Company vs. Industrial

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Commission, 294 Ill. 374. It is in accordance with the weight of authority and for this reason Goff was engaged in interstate commerce at the time of his death.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of Oct. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 628

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 7 1923

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In The Matter of the Petition of Maggie Harrigan for the removal of Ernest J. Galbraith ,Public Administrator, Administrator de bonis non of the Estate of Michael Harrigan, deceased, and for her appointment as executrix or administratrix de bonis non of said estate, Maggie Harrigan,

Appellant,

vs.

Ernest J. Galbraith,

Appellee.

Appeal from the Circuit Court of Peoria County

231 I.A. 628

Partlow, P. J.

Appellant, Maggie Harrigan, filed her petition in the probate court of Peoria county against appellee, Ernest J. Galbraith, public administrator of Peoria county, in which she prayed for the removal of appellee as administrator de bonis non of the estate of Michael Harrigan, deceased, and for the appointment of appellant as his successor. The probate court dismissed the petition, appellant appealed to the circuit court of Peoria county where the petition was again dismissed, and this appeal followed.

Michael Harrigan died in the city of Peoria on October 8, 1911, leaving a last will and testament which was admitted to probate. He appointed his two sisters, Maggie Harrigan and Kate Harrigan, and Christopher Harrigan, his brother, as executors of his will, and also named them as sole legatees of his estate to share equally. Maggie Harrigan refused to qualify as one of the executors and letters were issued to Christopher and Kate. On January 9, 1916, Kate died and Christopher acted as sole executor until he was removed by the probate court on October 5, 1918, for improper conduct as such executor, and in the same order, appellee, Ernest Galbraith, public administrator of Peoria county, was appointed as his successor. From this order of removal Christopher appealed to the circuit court of Peoria county where the order was affirmed. Christopher further appealed to the appellate court where the order of the circuit was affirmed on March

Fortlow, P. J.

9, 1920. (217 Ill. App. 661.) Christopher then filed a petition for a writ of certiorari in the Supreme Court, but his petition was denied on June 11, 1920. Maggie Harrigan, the appellant, did not appeal from this order of removal, but on June 16, 1920, she filed her petition in this case in the probate court of Peoria county in which she alleged that under the will of Michael Harrigan, after the payment of debts, no other persons had any interest in the estate except appellant, Christopher Harrigan and the heirs of Kate Harrigan; that the estate was not fully administered and that she was a fit and proper person to be administratrix. The petition set up the removal of Christopher, the appointment of Galbraith, and alleged that the appointment was made upon the petition of Peoria county, and the county had no right to nominate a successor; that the court had no jurisdiction to appoint Galbraith, and under section 38, chapter 3, and sections 1 and 18 of chapter 3 of the statute, it was the duty of the probate court to appoint appellant. Appellant alleged that she was not notified, or summoned, and was not brought before the court at the time Christopher was removed and appellee was appointed as his successor; that the probate court had no jurisdiction of appellant when the appointment was made; that the circuit court of Peoria county, the appellate court, and the Supreme Court had no jurisdiction of appellant when the various appeals were prosecuted; that while the cause was pending on appeal there was no vacancy in the office of administrator, and that the vacancy did not occur until after the final order of the Supreme Court on June 11, 1920. There were certain amendments to this petition in the probate court, and after the appeal to the circuit court various other amendments were made and issue was joined. The answer of the appellee admits some of the material facts of the petition, alleges that the appellee was duly and regularly appointed administrator, qualified as such, and was in fact the duly qualified and acting administrator, but denies that appellant is a fit person to be appointed

administratrix. A supplemental petition filed by the appellant in the circuit court set up facts tending to show that appellee was not a fit person to be administrator of the estate, and that after his appointment he resigned as public administrator of Peoria county, and for that reason no longer was entitled to serve as administrator.

A motion has been made by appellant to strike appellee's brief from the files and for judgment pro forma reversing the judgment of the circuit court for the reason that the brief and argumentafiled by the appellee does not comply with the rules of this court. This motion to strike has been taken with the case. Rule 17 of this court provides the manner in which the brief and argument of the respective parties shall be made up. The brief filed by the appellee is not in accordance with that rule but violates the rule in several respects. We would be justified in striking it from the files. It has been of very little assistance in deciding this case and has burdened the court with a vast amount of unnecessary work which could have been avoided if a brief had been filed as provided in the rule. Rule 21 provides that if a brief on behalf of the appellee is not filed within the time specified in the rules, that the judgment or decree of the court below will be reversed pro forma on the call of the docket, unless, on an examination of the record, the court shall deem it proper to decide the case upon its merits. Under this rule, even though a brief is not filed by the appellee, or the brief filed is stricken from the files, this court has the right to decide the case upon its merits if it deems proper. From our examination of this case we are of the opinion that it should be decided upon its merits and that the judgment should not be reversed pro forma. For this reason the motion to strike the brief will be denied.

As ground for reversal it is urged that appellant had no knowledge or notice of the removal of Christopher Harrigan as executor; that no summons was served upon her in that proceeding and that the court was without jurisdiction over her; that his

removal did not become effective until after the appeal was finally disposed of which was on June 11, 1920, when the certiorari was denied by the Supreme Court; that for this reason the probate court was without jurisdiction to appoint the appellee as administrator until the case was first settled on appeal; that immediately after the vacancy occurred appellant had the right, under the statute, to be appointed as administrator and she immediately filed her petition for that purpose; that the pleadings showed facts sufficient to justify the removal of appellee and the appointment of appellant; that the circuit court was in error in not trying the case de novo, in admitting and excluding evidence and in refusing to hold propositions of law submitted.

We do not deem it necessary to consider in detail these various grounds for reversal as urged, for the reason that in our judgment there is one view of the case which is conclusive of all questions presented. In People v. Harrigan, 294 Ill. 171, it appears that on March 25, 1913, a claim for back taxes was allowed in the probate court of Peoria county against the estate of Michael Harrigan and an appeal from that order was prosecuted by Christopher Harrigan and Maggie Harrigan to the circuit court of Peoria county. On October 5, 1918, which was the day after Christopher Harrigan was removed as executor, the appeal of Christopher Harrigan and Maggie Harrigan in that case was dismissed by the circuit court for the reason that a new appeal bond had not been filed by them within the time ordered by the circuit court. From this judgment of the circuit court dismissing that appeal a further appeal was prosecuted to the Supreme Court by Christopher Harrigan and Maggie Harrigan. In the Supreme Court in that case Christopher Harrigan and Maggie Harrigan contended that the circuit court had no jurisdiction to dismiss the appeal on October 5, 1918, for the reason that on October 4, 1918, the day prior, Christopher Harrigan had been removed as executor of the estate, and therefore there was no one present in the circuit court to represent the estate of Michael Harrigan at the time the order of dismissal was entered. In order to answer this contention of Christopher Harrigan and Maggie Harrigan, the other side filed

in the circuit court a certified copy of the order of the probate court showing the removal of Christopher Harrigan on October 4, 1918, and the appointment of Galbraith as administrator de bonis non. This part of the order appointing Galbraith was not called to the attention of either the circuit court or the Supreme Court by Christopher Harrigan or Maggie Harrigan. The Supreme Court held that the record showed the removal of Christopher Harrigan the appointment of Galbraith, that both parties were in court duly represented, and that the circuit court properly dismissed the appeal. The opinion in that case was filed in the Supreme Court on June 16, 1920, and the petition of the appellant in this case to remove the appellee as administrator and to be appointed as his successor was filed in the probate court of Peoria county on June 21, 1920.

It is a well known rule of law that a claim made or position taken in a former action or judicial proceeding will, in general, estop the party to make an inconsistent claim or to take a conflicting postion in a subsequent action or judicial rodeeding to the prejudice of the adverse party. II American & English Ency. of Law, page 446; 21 Corpus Juris, page 1228; Montague vs. Selb, 106 Ill. 49; Chaney vs. Ricks, 168 Ill. 533; Leigh vs. National Hollow Brake Beam Company, 224 Ill. 76; American Car Company vs. Hill, 286 Ill. 227; Jackson vs. Industrial Board, 280 Ill. 526.

In her petition filed in this case appellant alleges that she had no notice or knowledge of the removal of Christopher Harrigan as executor, that there was no process served upon her in that proceeding, that the removal of Christopher Harrigan as executor did not take place, or did not become effective, until after the petition for certiorari was denied by the Supreme Court on June 11, 1920, and yet it appears that in this prior case, as early as October 5, 1918, appellant and her brother both contended that Christopher Harrigan was in fact removed as executor on October 4, 1918, and for that reason there was no one to represent the estate at the time the circuit court dismissed the appeal in 294 Ill. 171. On account of her position taken in that case,

in the circuit court a certified copy of the order of the probate court showing the removal of Christo Ker Kyriakon on October 4, 1918, and the appointment of E. Jarecki as administrator de bonis non. This part of the order appointing Jarecki was not called to the attention of either the circuit court or the Supreme Court by Christo Ker Kyriakon or Angelo Kyriakon. The Supreme Court held that the record showed the removal of Christopher Kyriakon, the appointment of Galbreath, that both parties were in court duly represented, and that the circuit court properly dismissed the appeal. The opinion in the case was filed in the Supreme Court on June 16, 1920, and the petition of the plaintiff in this case to remove the appellee as administrator and to be appointed as his successor was filed in the probate court of Peoria county on June 21, 1920.

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In her petition filed in this case appellant alleges that she had no notice or knowledge of the removal of Christopher Kyriakon as executor, that there was no process served on her in that proceeding, that the removal of Christo Ker Kyriakon as executor did not take place, or did not become effective, until after the petition for certiorari was denied by the Supreme Court on June 11, 1920, and yet it appears that in this prior case, re early as October 5, 1918, appellant and her brother both executed that Christopher Kyriakon was in fact removed as executor on October 4, 1918, and for that reason there was no reversal by the action of the time the circuit court dismissed the appeal in [illegible], 171. On account of her position taken in that case,

she will not now be permitted in this case to claim that the removal did not take place until June 1st, 1920, or that she did not have notice or knowledge of such removal at the time it took place. The appellant was a party to both of these cases and the same question was at issue in each of them. While there were other questions at issue besides the one which was germane to both, yet that fact made no material difference and the position assumed by appellant in the prior case is binding upon her in this case.

In Harrigan vs. The People, 305 Ill. 242, Christopher Harrigan and Maggie Harrigan filed their bill in the circuit court of Peoria county to vacate an order of the probate court allowing certain back taxes against the estate of Michael Harrigan, deceased. The bill was filed on the ground that the probate court did not have jurisdiction to allow a claim of that character. The circuit court dismissed the bill for want of equity and the appellants appealed tothe Supreme Court. In that opinion the Supreme Court refers to the prior case, 294 Ill. 171, in which the appeal from the order allowing the taxes was prosecuted to the circuit court and the appeal was dismissed for failure to file cost bond, and on page 243 the court says; "When the appellants here, (Christopher Harrigan and Maggie Harrigan) as plaintiffs in error in the case of People vs. Harrigan, 294 Ill. 171, sought a review of the judgment of the circuit court dismissing their appeal, they had a right to complain of the action of that court in refusing to grant their motion to dismiss the suit for want of jurisdiction. If the circuit court refused to pass upon that motion they had a right to review of that refusal. The question was therefore open to consideration in the case when it last appeared in this court. The affirmance of the judgment of the circuit court was a decision against plaintiffs in error on all errors they assigned, whether mentioned in the opinion or not, and likewise also those that could have been presented. (Jackson vs. Glos, 249 Ill. 388; People vs. Waite, 243 Ill. 156; Lusk vs. City of Chicago, 211 Ill. 182.) Appellants are not entitled to a second hearing on

such errors. This being true, the circuit court of Peoria county did not err in dismissing appellants' bill, by which they seek to have set aside the order of allowance of the probate court."

Applying that rule to the facts in this case, it appears that when the appellant prosecuted her appeal in 294 Ill. 171, she sought to take advantage of the fact that the circuit court improperly dismissed her appeal on the ground that Christopher Harrigan had been removed as executor and there was no one present to represent the estate. If she had a right in that case to raise that question she also had the right to raise the question of the improper and illegal appointment of appellee as successor to Christopher Harrigan as executor. She did not raise that question upon that appeal and for that reason, as was held in 305 Ill. 242, the affirmance of the judgment of the circuit court was a decision against appellant on all errors assigned, whether mentioned in the opinion or not, and likewise also those that could have been presented. For these reasons, all material questions raised upon this appeal could have been presented on prior appeals in which the appellant was a party and in which the same questions here raised were involved. She is not entitled to a second hearing on such errors, and for that reason the circuit court properly dismissed her petition for the removal of Galbraith and for her appointment as his successor,

We find no reversible error and the judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of Oct. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 628

BE IT REMEMBERED, that afterwards, to-wit: On 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7164 Agenda No. 5

Mary Smith,

appellant,

vs.

Great Lakes Fruit Company,

a corporation,

appellee,

Appeal from Circuit Court

of Lake County.

231 I.A. 628

Jett, J.

Mary Smith, appellant, brought suit against Great Lakes Fruit Company, a corporation, appellee, for personal injuries. A trial was had, and the jury returned a verdict for appellee and against appellant. Judgment was rendered on the verdict of the jury, and from the action of the court in rendering judgment this appeal is prosecuted.

The first error urged is that the verdict of the jury is contrary to the evidence. The appellant was a passenger on an electric train of the Chicago, North Shore & Milwaukee Railroad Company. The train was proceeding in a northerly direction from Chicago toward Milwaukee, consisted of two cars, and was travelling at a rate of speed of from 40 to 50 miles per hour. Just east of the tracks of the railroad company and only a few feet distant therefrom was a public highway known as the Old Sheridan Road. This road was unpaved, but had a rock surface, and was 18 to 20 feet in width.

At about the hour of 9:30 in the evening of July 21st, 1930, a truck, belonging to appellee was being driven north on this highway. An automobile was coming south, driven by a man by the name of Dettman. The automobile and truck attempted to pass each other a short distance north of the interurban car. There was a collision between the truck and automobile, and it is claimed on the part of appellant that the automobile was knocked west on to the interurban tracks and the interurban cars were derailed, and

Gen. No. 7164 Agenda No. 5

Mary Smith,

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Great Lakes Fruit Company,

a corporation,

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Jett, J.

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The first error urged is that the verdict of the jury is contrary to the evidence. The appellant was a passenger on an electric train of the Chicago, North Shore & Milwaukee Railroad Company. The train was proceeding in a northerly direction from Chicago toward Milwaukee, consisted of two cars, and was travelling at a rate of speed of from 40 to 50 miles per hour. Just east of the tracks of the railroad company and only a few feet distant there- from was a public highway known as the Old Sheridan Road. The road was unpaved, but had a rock surface, and was 18 to 30 feet in width.

At about the hour of 9:30 in the evening of July 31st, 1920, a truck, belonging to appellee was being driven north on this highway. An automobile was coming south, driven by a man by the name of Dettman. The automobile and truck attempted to pass each other a short distance north of the interurban car. There was a collision between the truck and automobile, and it is claimed on the part of appellant that the automobile was knocked west on to the interurban track and the interurban cars were derailed, and

2311A 629

Agenda From Clerk's Desk

of Lake County.

appellant was thrown against a seat in the car in which she was riding and was seriously injured.

The evidence shows the truck with its load weighed about 12 tons. It was 20 feet in length and 8 feet in width, and was going 8 or 10 miles per hour. There were three men on this truck. The driver testified his left wheels were west of the center of the road. There were two oil lamps on the truck. The automobile was occupied by Dettman, his wife and his brother in law. The three occupants of the automobile testified that as they approached the truck it was swerving from side to side on the highway, sometimes on one side and sometimes on the other, and just before it reached the automobile it was driven in a northwesterly direction and struck the automobile, knocking it on to the interurban tracks. The automobile was travelling from 12 to 15 miles per hour just prior to the collision. The evidence of disinterested witnesses was to the effect that they smelled intoxicating liquor on the breath of the driver of the truck, and he admitted that before leaving Chicago, about six o'clock in the evening, he and his two companions drank a pitcher of some kind of liquor. The tracks of the truck on the highway were plainly visible and showed the truck was travelling either in the center of the road or west of the center, and that before it struck the automobile it turned in a northwesterly direction toward the automobile.

Two witnesses testified that a few miles south of the place of the collision, mentioned and described in the declaration in this cause, they were travelling in an automobile on this same evening in question and met this same truck, and that the driver crowded them on to the railroad track. On a prior trial, growing out of the same facts involved in this case, the driver of the truck denied this, but in this trial he, in substance, admitted it.

On the east side of the highway there was a ditch and on the west side, next to the interurban tracks, there was an embankment of cinders. The marks in the cinder embankment showed distinctly

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appellant was thrown against a seat in the car in which she was

where the automobile was forced through the cinders.

After a careful examination of all the evidence, as disclosed by the record, we are of the opinion that it establishes the negligence charged against appellee in appellant's declaration, and that the verdict of the jury is contrary to the weight of the evidence and, for this reason alone, if for no other, the judgment should be reversed.

Complaint is made of the ruling of the court in the admission and exclusion of evidence. Apparently, there is some slight error in this respect, but in the main we think the ruling of the court on the admissibility of testimony was correct. The declaration consists of a number of counts. Some of them charged common law negligence and others alleged wanton and wilful acts upon the part of the driver of appellee's truck. At the close of the evidence the court instructed the jury to find for the appellee on all wilful and wanton counts in the declaration, and we are of the opinion this ruling was correct.

It is insisted on the part of appellant that a number of instructions given on the part of appellee are erroneous. It is claimed there is no evidence on which to base the third and fourth instructions, but after an examination of this record we are not prepared to say that the complaint relative to these two instructions is altogether well taken. They could be improved upon, but considered as a part of a series of instructions we are not prepared to say that they are, within themselves, erroneous.

A more serious question arises upon the 5th and 6th instructions, given on the part of appellee. Number 5 is as follows:

"You are instructed that before the plaintiff can recover in this case, she must prove by the preponderance or greater weight of the evidence, that the driver of the defendant's truck had notice, or by the exercise of ordinary care, could have had notice of the position of the automobile in the road, which made a collision with it imminent long enough before the collision to enable said driver to form an intelligent opinion as to how the collision might be avoided and apply means for avoiding it. If you find from the evidence in

where the automobile was forced through the window.

After a careful examination of all the evidence, as disclosed by the record, we are of the opinion that it establishes the negligence charged against appellee in appellant's declaration, and that the verdict of the jury is contrary to the weight of the evidence and, for this reason alone, if for no other, the judgment should be reversed.

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It is insisted on the part of appellant that a number of instructions given on the part of appellee are erroneous. It is claimed there is no evidence on which to base the third and fourth instructions, but after an examination of this record we are not prepared to say that the complaint relative to these two instructions is altogether well taken. They could be improved upon, but considered as a part of a series of instructions we are not prepared to say that they are, within themselves, ~~[illegible]~~.

A more serious question arises upon the 5th and 6th instructions, given on the part of appellee. Number 5 is as follows:

"You are instructed that before the plaintiff can recover in this case, she must prove by the preponderance or greater weight of the evidence, that the driver of the defendant's truck had notice, or by the exercise of ordinary care, could have had notice of the position of the automobile in the road, which made a collision with it imminent long enough before the collision to enable said driver to form an intelligent opinion as to how the collision might be avoided and apply means for avoiding it. If you find from the evidence in

this case that the driver of the truck did not have such notice or by the exercise of ordinary care could not have had notice long enough before the collision if you believe there was a collision, to form an intelligent opinion as to how the accident might be avoided, and apply means of avoiding the same, then you are instructed that the plaintiff cannot recover and you must find the defendant not guilty."

Under the evidence in this case instruction No. 5 has no place in this record. The rule of law, as announced in this instruction, is not applicable to the facts as disclosed in this cause. The driver of the truck knew that he was upon a public highway; that he was driving upon the highway in the night time, and it was his duty to conduct himself in the management and in the handling of the truck so as not to interfere with others who had the same right to the use of the highway. To inform the jury that it was incumbent upon appellant to prove by the preponderance or greater weight of the evidence that the driver of appellee's truck had notice, or by the exercise of ordinary care could have had notice of the position of the automobile in the road, which made a collision with it imminent long enough before the collision to have enabled the driver to form an intelligent opinion as to how the collision might be avoided and apply means for avoiding it, was exacting more of appellant than the law required her to show. The facts in this case are, within themselves, sufficient to condemn this instruction. It was incumbent upon the driver of the automobile to exercise ordinary care in the handling of the truck, and to keep a lookout for any person or persons that might be upon said roadway.

The 6th instruction complained of is as follows:

"You are instructed that in arriving at your verdict in this case, you must be guided as to the facts entirely by the evidence. You are not at liberty to guess or conjecture that the accident may have happened because of some negligence of the defendant's driver, but unless you find as a matter of fact from the preponderance of all the evidence that the accident actually happened through some

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above. The facts in this case are, within themselves, sufficient it, was exacting more of appellant than the law required her to pon the collision might be avoided and apply means for avoiding to have enabled the driver to form an intelligent opinion as to made a collision with it imminent long enough before the collision had notice of the position of the automobile in the road, which truck had notice, or by the exercise of ordinary care could have or greater weight of the evidence that the driver of appellee's that it was incumbent upon appellant to prove by the preponderance had the same right to the use of the highway. To inform the jury the handling of the truck so as not to interfere with others who and it was his duty to conduct himself in the management and highway; that he was driving upon the highway in the night time, struction, is not applicable to the facts as disclosed in this cause. The driver of the truck knew that he was upon a public place in this record. The rule of law, as announced in this in-

Under the evidence in this case instruction No. 5 was no

the defendant not guilty."

are instructed that the plaintiff cannot recover and you must find might be avoided, and apply means of avoiding the same, then you collision, to form an intelligent opinion as to how the accident long enough before the collision if you believe there was a or by the exercise of ordinary care could not have had notice this case that the driver of the truck did not have such notice

negligence of the driver of the truck, your verdict must be for the defendant. And if from a consideration of all the evidence before you in this case under the instructions of the court, you are in doubt and unable to say whether the accident was proximately caused or contributed to by the defendant's truck, or was caused by the negligence of the driver of the automobile, if any, or by the negligence of the Chicago, North Shore & Milwaukee Electric Company, if any, or by the combined negligence of the railroad company and the driver of the automobile, if you believe either or both were negligent, then you must find the defendant not guilty".

This instruction is misleading and calculated to confuse the jury and should not have been given. The law necessarily arises from the evidence developed in the trial. There is nothing in this cause that authorized this instruction. It will be remembered the primary question was for the jury to determine whether appellee's servant was guilty of negligence, which was the proximate cause of the injury, and their province being to further determine whether by the commission of some act which ought not to have been done, or by the omission of some act which ought to have been done, the injury resulted, in either event the inquiry before them was with reference to the acts of appellee's servant alone. If the negligence of appellee contributed to the injury, the negligence of the railroad company would not excuse appellee from liability. Neither would the combined negligence of the railroad company and the driver of the automobile excuse appellee from liability for the negligence of appellee's truck driver. If the negligence of the truck driver concurred or assisted in causing the injury to appellant, who was not negligent, then appellee would be liable. Wolff Manufacturing Co. vs. Wilson, 152 Ill. 9; Thompson vs. St. Louis, I.M. & S.Ry.Co. 169 Ill. App. 254.

We are clearly convinced that reversible error was committed in the trial of this cause, and that the judgment should be reversed and the cause remanded, which is accordingly done.

Reversed and remanded.

Reversed and remanded.

We are clearly convinced that reversible error was committed in the trial of this cause, and that the judgment should be reversed and the cause remanded, which is accordingly done.

189 Ill. App. 324.

Co. vs. Wilcox, 152 Ill. 3; Thompson vs. St. Louis, I.M. & S.Ry.Co.

not negligent, then appellee would be liable. Wolff Manufacturing

connected or assisted in causing the injury to appellant, who was

of appellee's truck driver. If the negligence of the truck driver

of the automobile excuse appellee from liability for the negligence

would the combined negligence of the railroad company and the driver

road company would not excuse appellee from liability. Neither

of appellee contributed to the injury, the negligence of the rail-

reference to the acts of appellee's servant alone. If the negligence

injury resulted, in either event the injury before this was with

by the omission of some act which ought to have been done, or

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servant was guilty of negligence, which was the proximate cause of

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the negligence of the Chicago, North Shore & Milwaukee Electric

caused or contributed to by the defendant's truck, or was caused

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fore you in this case under the instructions of the court, you are

the defendant. And if from a consideration of all the evidence be-

negligence of the driver of the truck, near verdict must be for

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of Oct. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 629

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7190 & 7191 Agenda 14.

Faye Crapnell,

appellant,

vs.

Goff Crapnell,

appellee,

Appeal from the Circuit Court of Mercer County.

231 I.A. 629

Jett, J.

In this proceeding two appeals are involved which have been consolidated by this court. The first is No. 7190, being an appeal from an order entered by the circuit court of Mercer County denying a motion made by appellant in that court to vacate and set aside a decree for divorce in favor of appellee and against appellant.

The other case is No. 7191, and is an appeal from the decree itself. The decree for divorce in this cause was entered on an amended cross-bill. The original bill of complaint was filed July 5, 1921, by appellant, and was for separate maintenance. The ground upon which the relief was asked in the suit for separate maintenance was that of cruelty. Appellee filed an answer denying the charge of appellant. No hearing was had on the original bill filed in this cause, for separate maintenance.

On the 4th day of May, 1922, appellee filed without notice to appellant, a cross bill praying for a divorce from appellant on the ground of desertion, for a period of two years and upwards prior to said date. In his cross-bill appellee alleged appellant wilfully deserted him on or about May 1, 1920, and had refused to live and cohabit with him thereafter, and asked that the care, custody and education of their child be awarded to him because of the "unstable disposition and dissatisfied state of mind" of appellant. No answer was filed to this cross-bill, and the record does not show that any rule on appellant to plead, answer or demur to it, although in the decree for divorce subsequently entered on an amended cross-bill it was recited that on the 11th day of September, 1922, a rule was entered on appellant ruling her to plead, answer or demur to the original cross-bill by ten o'clock on the morning of the 13th of September

Tape Crapnell.

Appellant.

vs.

Gott Crapnell,

Appellee.

Appeal from the Circuit Court of Warren County.

Heft, J.

In this proceeding two appeals are involved which have been consolidated by this court. The first is No. 1280, being an appeal from an order entered by the circuit court of Warren County denying a motion made by appellant in that court to vacate and set aside a decree for divorce in favor of appellee and against appellant.

The other case is No. 1281, and is an appeal from the decree itself. The decree for divorce in this cause was entered on September 5, 1931, by appellant, and was for separate maintenance. The grounds upon which the relief was asked in the suit for separate maintenance were that of cruelty. Appellee filed an answer denying the charge of appellant. No hearing was had on the original bill filed in this cause, for separate maintenance.

On the 4th day of May, 1932, appellee filed without notice to appellant, a cross bill praying for a decree from appellant by the ground of desertion, for a period of two years and upwards prior to said date. In his cross-bill appellee alleged appellant wilfully deserted him on or about May 1, 1931, and had refused to live and cohabit with him thereafter, and asked that the care, custody and education of their child be awarded to him because of the "mental disposition and dissatisfied state of mind" of appellant. To answer and cross-bill appellant filed a motion to dismiss the cross-bill, and the record does not show that any action to pleas, answer or demur to it, although in the decree for divorce subsequently entered on the original cross-bill it was recited that on the 11th day of September, 1932, a duly and authorized order entered by the court overruling said motion was entered on appellant ruling her to plead, answer or demur to the cross-bill by ten o'clock on the morning of the 13th of September,

1932. On the said 13th day of September, 1932, appellee filed an amended cross-bill for divorce. The amended cross-bill recited that it was filed by leave of the court. In said amended cross-bill appellee prayed for a decree of divorce from appellant on the charge of adultery. He recited the filing of said original bill of complaint and answer thereto, but did not mention the original cross-bill.

Appellee, in his amended cross-bill, also charged appellant deserted him, but not on the first day of May, 1930, as alleged in the original cross-bill. He fixed the date of desertion as June 30th, 1931. He then alleged two specific acts of adultery on the part of appellant. One on about May 1, 1931, with one J. Finch, and the other on June 1, 1931, with one John Doe, whose proper name it is alleged is unknown to appellee.

Appellee further stated that he did not learn of either act of adultery until after appellant had ceased to live with him on June 30, 1931. He further alleged in the amended cross-bill that appellant for nearly a year had been residing in the City of Chicago, and on the 15th day of August, 1932, she filed a bill of complaint in the circuit court of Cook county praying for a divorce on the ground of cruelty. That in this complaint she charged she was a resident of Cook county.

Appellee also asked in the amended cross-bill for the care and custody of the child because of the "unstable disposition and dissatisfied state of mind" and "moral makeup" of appellant, and prayed that appellant be deprived of any and all right in and to any of his property.

No answer was filed by appellant to the amended cross-bill and no rule entered on her to plead, answer or demur to it. The same date that the amended cross-bill was filed the cause was called for a hearing, and the hearing was had and a decree rendered in favor of appellee and against appellant, for divorce, and the same was granted on the amended cross-bill.

On the 28th of September, 1932, appellant filed a written

On the 18th of September, 1833, appellant filed a motion
granted on the amended cross-bill.

Appellee, in his amended cross-bill, also charged appellant
of adultery. He recited the filing of said original bill;
charge of adultery. He denied the filing of said original bill;
that it was filed by leave of the court. It will instead cross-
amended cross-bill for divorce. The amended cross-bill recited
bill appellee prayed for a decree of divorce from appellant on the
of complaint and answer thereto, but did not mention the original
cross-bill.

Appellee further stated that he did not learn of alleged
of adultery until after appellant had ceased to live with him on
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a hearing, and the hearing was had and a decree rendered in favor
of appellee and against appellant, for divorce, and the said

motion asking that the decree of divorce entered on the 13th of September, 1923, be vacated and set aside. This motion was supported by the affidavits of appellant and of one Charles Bloomer. A hearing upon the motion to vacate the decree was had on the 16th of October, 1923. Appellant tendered to the court and asked leave to file answers to both the original and amended cross-bills. These answers contained denials of the charges made against appellant in said original and amended cross-bills respectively. The court denied the motion to vacate the decree and refused to permit appellant to file her answer to the original or amended cross-bills. Appellant appealed from the order of the court denying the motion to vacate and set aside the decree. Also from the decree itself.

By reason of the conclusion we have reached in this case we will discuss only the action of the court in denying the motion of appellant to set aside and vacate the decree and the refusal to permit appellant to answer cross-bills. There is no record of any default being entered, except the recital in the decree where the recital is that the cross defendant's default was entered as to the original cross-bill. The decree did not recite that any rule was entered against the appellant to answer the amended cross-bill after the same was filed nor that her default was entered as to the amended cross-bill.

We are of the opinion that the trial court erred in not granting the motion to vacate the decree. It is insisted by appellee that under a standing rule of the trial court, all answers were due from the defendant on the second day of the term. This rule can have no application in this proceeding.

In the case of Odell v. Levy, 307 Ill. at page 281, the court said: "It is a rule of chancery practice that by filing an amended or supplemental bill all previous decretal orders are vacated and the defendants may answer the original and amended or supplemental bill. Such an amended or supplemental bill is held to make a new case and to authorize it to proceed as though a decree pro confesso had not been rendered. The defendant in such case has a right to

motion asking that the decree of divorce entered on the 18th of September, 1933, be vacated and set aside. This motion was supported by the affidavits of appellant and of one Charles Bloomer. A hearing upon the motion to vacate the decree was had on the 11th of October, 1933. Appellant tendered to the court and asked leave to file answers to both the original and amended cross-bills. These answers contained denials of the charges made against appellant in said original and amended cross-bills respectively. The court denied the motion to vacate the decree and refused to permit appellant to file her answer to the original or amended cross-bills. Appellant appealed from the order of the court denying the motion to vacate and set aside the decree. Also from the decree itself.

By reason of the conclusion we have reached in this case we will discuss only the action of the court in denying the motion of appellant to set aside and vacate the decree and the refusal to permit appellant to answer cross-bills. There is no record of any default being entered, except the recital in the decree where the recital is that the cross defendant's default was entered as to the original cross-bill. The decree did not recite that any rule was entered against the appellant to answer the amended cross-bill after the same was filed nor that her default was entered as to the amended cross-bill.

We are of the opinion that the trial court erred in not granting the motion to vacate the decree. It is sustained by appellee that under a standing rule of the trial court, all answers are due from the defendant on the second day of the term. This rule does not have no application in this proceeding.

In the case of Odell v. Levy, 327 Ill. at page 581, the court said: "It is a rule of chancery practice that by filing an amended or supplemental bill all previous decrees are vacated and the defendants may answer the original or supplemental bill. Such an amended or supplemental bill is held to make a new case and to authorize it to proceed as though a decree pro confesso had not been rendered. The defendant in such case has a right to

answer both the original and supplemental bill. (Gibson v. Rees, 50 Ill. 383). The effect of amending the bill after a decree pro-confesso is stated to be, to render the previous order to take the bill pro confesso in operative even where the purpose of the amendment is to rectify a clerical error. (1 Daniell's Ch. Pl. & Pr. (6th Am. ed.) *435; Weightman v. Powell, 3 De G. & J. 570). The effect of amending the bill after a decree pro confesso is to set aside the default without any order of the court. (Gibson v. Rees, supra; Lyndon v. Lyndon, 69 Ill. 43; South Chicago Brewing Co. v. Taylor, 205 Id. 132; Ruppe v. Glos, 251 id. 80)."

There is nothing in appellee's contention that the cross defendant does not come into court with clean hands because of her having filed a suit for separate maintenance in Mercer County and afterwards a suit for divorce in Rock County without advising either court of the pendency of the other proceedings. Neither do we think there is any force to appellee's contention that the court properly refused to permit cross defendant's motion to vacate the decree and for leave to file answer to the amended cross bill on the ground that she did not present her answers with her motion. It is sufficient to say that at the time of the hearing upon the motion she did present her answers for filing and the motion was denied on other grounds and not because of her failing to present her answers at the time the motion was filed.

We are of the opinion, therefore, the decree was premature and improperly entered. The consolidated causes are reversed and remanded with the direction that appellant be permitted to answer the cross bill as amended.

Reversed and remanded with directions.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of Oct. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 629

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7201 Agenda 44.

L. C. Miller, Trustee in Bankruptcy for the Estate of Frank R. Bertolasi, bankrupt,

appellant,

vs.

Appeal from Circuit Court

Winnebago County.

Standard Foundry & Manufacturing Company, a corporation, and The Commercial National Bank of Rockford, a corporation,

appellees,

231 I.A. 329

Jett, J.

In March, 1921, the Standard Foundry & Manufacturing Company appellee, sold to Frank R. Bertolasi, thirty furnaces. As a part of the contract Bertolasi was to give the Standard Foundry and Manufacturing Company a trade acceptance. The furnaces were shipped under the contract; the trade acceptance was given, and when it became due an effort was made to collect same from Bertolasi by a representative of the Standard Foundry and Manufacturing Company. Being unable to make the collection, appellee took from Bertolasi an assignment of his book accounts and a chattel mortgage on other personal property possessed by said Bertolasi, and requested him to deliver to it the furnaces he had on hand which he had purchased from appellee under the contract, there being nine furnaces in number remaining. Bertolasi did deliver the nine furnaces and was given credit on his account by said appellee for the furnaces returned for the exact sum of money for which they had been sold to him. On November 28, 1921, when the demand was made by said company for the return of the furnaces remaining unsold from Bertolasi, he made out, signed and delivered to it a bill of sale for the furnaces returned. A petition in bankruptcy was filed against Bertolasi, and he was adjudged a bankrupt on the 6th day of March, 1922, and L. C. Miller was appointed trustee. The return of the furnaces was made between two and one half and three months prior to the filing of the petition in bankruptcy against Bertolasi, and adjudication of him as a bankrupt.

L. G. Miller, Trustee in
Bankruptcy for the Estate of
Frank R. Bertolani, bankrupt,

appellant,

vs.

Standard Foundry & Manufacturing
Company, a corporation, and The
Commercial National Bank of Tuc-
son, a corporation,

appellees.

Tott, J.

In March, 1921, the Standard Foundry & Manufacturing Company, appellee, sold to Frank R. Bertolani, thirty furnaces. As a part of the contract Bertolani was to give the Standard Foundry and Manufacturing Company a trade acceptance. The furnaces were shipped under the contract; the trade acceptance was given, and when it became due an effort was made to collect same from Bertolani by a representative of the Standard Foundry and Manufacturing Company. Being unable to make the collection, appellee took from Bertolani an assignment of his book accounts and a chattel mortgage on other personal property possessed by said Bertolani, and requested him to deliver to it the furnaces he had on hand which he had purchased from appellee under the contract, there being nine furnaces in number remaining. Bertolani did deliver the nine furnaces and was given credit on his account by said appellee for the furnaces returned for the exact sum of money for which they had been sold to him. On November 29, 1921, when the demand was made by said company for the return of the furnaces remaining unsold from Bertolani, he made out, signed and delivered to it a bill of sale for the furnaces returned. A petition in bankruptcy was filed against Bertolani, and he was adjudged a bankrupt on the 6th day of March, 1922, and L. G. Miller was appointed trustee. The return of the furnaces was made between two and one half and three months prior to the filing of the petition in bankruptcy against Bertolani, and adjudication of him as a bankrupt.

On September 15, 1922, the trustee in bankruptcy filed a suit in the Circuit Court of Winnebago County, seeking among other things to set aside the return of the furnaces from Bertolasi to appellee, it being the contention of the trustee in bankruptcy that Bertolasi had preferred it as a creditor.

A trial of this cause was had in the Circuit Court of Winnebago County, and the court rendered a decree in which the title to the nine furnaces was permitted to be and remain in appellee, and it is from that part of the decree that appellant prosecutes this appeal. It is insisted by appellee that the sale of the furnaces in question was a conditional one. In the contract the following language is found: "It is agreed and understood, as a part of this order, that full title and ownership of all goods remain in the name of the Standard Foundry and Manufacturing Company until fully paid for".

A contract for the sale of goods, by the terms of which the title and ownership remain in the seller until they are paid for in cash, is a conditional sale contract. Staver Carriage Company v. Richardson, 203 Ill. App. 620; Jensen v. Wilcox Lumber Co. 295 Ill. 294.

The doctrine of conditional sale is recognized by the law of this state in favor of the original vendor, except as against bona fide purchasers and execution creditors. Herbert v. Rhodes Burford Furniture Co. 106 Ill. App. 583.

One who sells goods under a conditional sale contract, title to be retained in vendor until purchase price is fully paid, has a right to take possession of the property on default as against the claim of vendee. A conditional vendee of personal property is entitled, upon default, to the possession of the property as against the trustee in bankruptcy of the vendee, if such trustee acquired no greater right therein than the bankrupt. Toledo Computing Scale Co. v. Johnson, 194 Ill. App. 159.

It is urged by appellant that by reason of the fact appellee took a bill of sale and a mortgage, it is now estopped from making claim that this was a conditional sale contract. It is insisted that it

On September 15, 1922, the trustee in bankruptcy filed a suit in the Circuit Court of Winnebago County, seeking among other things to set aside the return of the furnace from defendant to appellee, it being the contention of the trustee in bankruptcy that defendant had preferred it as a creditor.

A trial of this cause was had in the Circuit Court of Winnebago County, and the court rendered a decree in which the title to the mine furnace was permitted to be and remain in appellee, and it is from that part of the decree that appellant prosecutes this appeal. It is insisted by appellee that the sale of the furnace in question was a conditional one. In the contract the following language is found: "It is agreed and understood, as a part of this order, that full title and ownership of all goods remain in the name of the Standard Foundry and Manufacturing Company until fully paid for".

"A contract for the sale of goods, by the terms of which the title and ownership remain in the seller until they are paid for in cash, is a conditional sale contract. Beaver Carriage Company v. Richardson, 203 Ill. App. 630; Deneen v. Wilcox Lumber Co. 239 Ill. 294.

The doctrine of conditional sale is recognized by the law of this state in favor of the original vendor, except as against bona fide purchasers and execution creditors. Meubert v. Moline Buffard Furniture Co. 106 Ill. App. 582.

One who sells goods under a conditional sale contract, title to be retained in vendor until purchase price is fully paid, has a right to take possession of the property on default as against the claim of vendee. A conditional vendee of personal property is entitled, upon default, to the possession of the property as against the trustee in bankruptcy of the vendee, if such trustee acquired no greater right therein than the bankrupt. Toledo Computing Scale Co. v. Johnson, 194 Ill. App. 168.

It is urged by appellant that by reason of the fact a petition and a bill of sale and a mortgage, it is not barred from making claim that this was a conditional sale contract. It is insisted that it

admitted by its dealings with Bertolasi that the title was in him. A trustee in bankruptcy stands in the shoes of the bankrupt, and has no better title to the property of a bankrupt than the latter had at the time of the filing of the petition, and he does not occupy the position of an innocent third person having a judgment or lien against a bankrupt property. Chicago Title & Trust Co. v. National Storage Co. 260 Ill. 485.

We are not prepared to say, in view of the record as presented in this case, the conduct of the Standard Foundry and Manufacturing Company has been such that it is estopped from making the claim that the contract in question was a conditional sale contract.

At the time appellee repossessed the furnaces there were no executions, attachments or liens existing against the personal property of Bertolasi, and at the time the petition in bankruptcy was filed appellee had all the furnaces in its possession, and the trustee in bankruptcy acquired no right whatever in the furnaces, and in our opinion the trustee of the bankrupt cannot invoke the doctrine of estoppel in pais or waiver as against appellee, for the reason that when the petition in bankruptcy was filed the bankrupt, Bertolasi, could not, in any court, have invoked as against said appellee, the doctrine of estoppel in pais or waiver.

An estoppel in pais, to be binding upon the parties against whom it is claimed, must be established by clear and convincing evidence, and is only sanctioned in order to prevent the perpetration of fraud or to effectuate justice, and it must appear also, before it can be invoked, that the party seeking its application must have changed his condition or conduct in consequence of statements or declarations made, or acts done by the party against whom the estoppel is invoked. Potter v. Fitchburg Steam Engine Co. 110 Ill. App. 454. Nicholson v. Moloney, 195 Ill. 575.

We have carefully examined all the questions raised in this case, and we conclude, therefore, that the decree of the Circuit Court of Winnebago County should be affirmed, which is accordingly done.

Decree affirmed.

admitted by its dealings with Bertolani that the title was in him.
A trustee in bankruptcy stands in the shoes of the bankrupt, and
has no better title to the property of a bankrupt than the latter
had at the time of the filing of the petition. and he does not
occupy the position of an innocent third person having a judgment
or lien against a bankrupt property. Chicago Title & Trust Co. v.
National Storage Co. 260 Ill. 488.

We are not prepared to say, in view of the record as presented
in this case, the contract of the standard Country and Manufacturing
Company has been such that it is estopped from making the claim
that the contract in question was a conditional sale contract.

At the time appellee repossessed the furnaces there were no
encumbrances, attachments or liens existing against the personal pro-
perty of Bertolani, and at the time the petition in bankruptcy was
filed appellee had all the furnaces in its possession, and the
trustee in bankruptcy acquired no right whatever in the furnaces, and
in our opinion the trustee of the bankrupt cannot invoke the doctrine
of estoppel in pais or waiver as against appellee, for the reason
that when the petition in bankruptcy was filed the bankrupt, Bertol-
lani, could not, in any court, have invoked as against said appellee,
the doctrine of estoppel in pais or waiver.

An estoppel in pais, to be binding upon the parties against whom
it is claimed, must be established by clear and convincing evidence,
and is only sanctioned in order to prevent the perpetration of fraud
or to effectuate justice, and it must appear also, before it can be
invoked, that the party seeking its application must have changed
his condition or omitted in consequence of statements or declarations
made, or acts done by the party against whom the estoppel is invoked.
Potter v. Pittsburg Steam Engine Co. 110 Ill. App. 484. Hamilton
v. Mahoney, 142 Ill. 470.

We have carefully examined all the questions raised in this case,
and we conclude, therefore, that the decree of the Circuit Court of
Winnebago County should be affirmed, which is accordingly done.

Decree affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 28th day of Oct., in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A.

BE IT REMEMBERED, that afterwards, to-wit: On SEP 7 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7205 Agenda No. 23

J. J. Rubenstein,

appellant,

vs.

William R. Cone,

appellee,

Appeal from the Circuit Court

of Peoria County.

231 I.A. 629

Jett, J.

It appears from the evidence that following a conversation had in Peoria, appellant, on January 15, 1921, wrote appellee, a resident of Peoria from Fort Worth, Texas, where he resided, that his brother, who was connected with him in various oil deals wished to dispose of five hundred shares of stock of the Sigler Oil Company, seventy five shares of stock of the Frankel-Koch Oil Company and 250/100,000 interest in the Hazeltine Syndicate, and would accept for all, four notes of five hundred dollars each, aggregating two thousand dollars. On January 18th, appellee wired appellant from Peoria accepting the offer and stating that he perferred the papers sent to private parties, and on the same day he confirmed his message by a letter in which, after quoting his wire of that day, he stated, viz; "This means I will purchase the five hundred shares of Sigler, seventy five shares Frankel-Koch, and the two hundred and fifty dollar interest in Hazeltine Syndicate for the sum of two thousand dollars, payable by four notes of five hundred dollars, each, one payable each month, or I will borrow and give you seventeen hundred dollars in cash instead of the notes". He further in this letter advised appellant that he preferred to have the papers sent to appellant's father-in-law, Harry Frankel, Sr., who lived in Peoria, as he did not wish the banks to know his business. On the same day, appellant by wire acknowledged the receipt of appellee's message, advised appellee that he had closed the deal with his brother and stating that four notes of five hundred dollars each as offered would be accepted in payment thereof. Again on January 20th, appellant wrote appellee acknowledging receipt of his letter of the 18th inst., and requesting that he advise appellant, to whom

Ger. No. 7258

J. J. Hunsecker,

Astoria,

Jeff, J.

Dear Sir:

I'm sorry I'm unable to meet your wishes in the matter of the 1897 issue, but remembering that my valued advertisement is also of the 1897 issue, I am sure you will see that it would be useless for me to insert it. Times are changing, and I am changing with them. Please, therefore, accept my thanks for your kind offer, and believe me

Yours truly,

William R. Cone,

per

Editor and Publisher Council.

he wanted the stock transferred, requesting the four notes and informing him that it was satisfactory with him to have his father-in-law handle the deal in Peoria. On January 23nd appellant wrote him again that he would have the stock transferred to appellee on the 24th, and that if he wanted it transferred in anyone else's name to immediately wire him, and inquiring whether the notes in payment therefor had been sent or whether he desired the certificates sent to his father-in-law to be delivered upon the receipt of the notes. On January 25th appellant wired appellee that he was having the stock transferred to him, and on the 26th inst., wrote appellee that he was sending to his father-in-law the certificates of stock in the Frankel-Koch and Figler Oil Companies and advising him that the interest in the Mazeltine Syndicate had been sent to Prescott, Arizona, for transfer.

On January 31, 1931, appellee wrote appellant at Fort Worth, Texas, from Peoria, to sell the stock to someone else, inasmuch as he did not care to go through with the deal, to which appellant replied on January 28th from Vernon, Texas, stating that he had just received appellant's letter of the 21st inst., which had been forwarded to him from Fort Worth, and advised appellee that the stock had been transferred, and in accordance with his instructions had been sent to Mr. Frankel on the 25th inst., and requesting appellee to call on Mr. Frankel in Peoria, and receive the certificates of stock, and execute the notes. Appellee refused to complete the transaction, and in reply to appellant's repeated requests to do so wrote appellant on February 7th inquiring what damages he considered he had sustained, and on the 14th of February wrote appellant again advising him that he had not had a reply to his former letter, and stating that as soon as he received an answer he would then determine whether he would accept the deal or pay appellant damages.

The matter not having been adjusted this suit was instituted by appellant to recover the contract price, which resulted in a judgment rendered upon a verdict of a jury in favor of appellee.

from which judgment appellant appealed.

It appears from the evidence that immediately after receiving appellee's letter of January 18th, appellant purchased the stock from his brother, had the certificates of stock in the Frankel-Koch and Sigel Companies transferred to appellee, and mailed them to his father-in-law, Harry Frankel, Sr. at Peoria, and sent the certificate of interest in the Mazeltine Syndicate to Prescott, Arizona, for transfer with instructions to send it, when transferred, direct to appellee at Peoria. Mr. Frankel received the certificates of the Frankel-Koch and Sigler Companies on January 26, 1931, and immediately had a conversation with appellee over the phone in which he advised appellee of the fact that he had received these certificates and appellee told him that owing to some objections made by his wife, he would not complete the transaction. Mr. Frankel requested an appointment at appellee's office, and Frankel testified that appellee stated it would be no use, and requested Frankel to wire his son-in-law so that the stock could be sold to some one else, and to inform appellant that he (appellee) would make good any loss to him. Appellee admitted he had a conversation with Harry Frankel, Sr. but denied he told him if there were any losses in selling the stock that he would pay them. Appellant testified that shortly after appellee refused to complete his purchase, he came to Peoria, presented all the certificates and blank notes to appellee, who took them and examined them, but refused the certificates, stating that "Mrs. Cone objects to my going in and I will pay you damages". Appellant further testified that he had been at all times since January 26, 1931, ready, willing and able to deliver to appellee these certificates. Appellee testified that he had never seen these certificates until the trial of this cause, and that they had never been at any time, tendered to him.

It will be remembered that the evidence relative to the sale of this stock consists of letters and telegrams and this correspondence shows that there was a valid and binding sale which appellee recognized. It is true that he now claims that he purchased this stock from the brother of appellant. This is clearly an afterthought, and his

from which judgment ought to be given.

It appears from the evidence that some months after receiving
Appellee's letter of January 15th, appellee purchased the light
from his brother, and the certificate of title in the Pennsyl-
Hood and Light Company transferred to appellee, was mailed from
to his father-in-law, Harry Pashby, Jr. It further, was sent the
certificate of interest in the Meredith Syndicate to himself,
Arizona, for transfer with instructions to send it, when transferred,
direct to appellee at Peoria. Mr. Pashby received the certificate
of the Pratzel-Hood and Light Company on January 19, 1921, and
immediately had a conversation with appellee only the nature of which
be gained appears of the fact that he had to testify there conflicting
and appellee told him that owing to some objections made by his wife,
he would not complete the transaction. Mr. Pashby negotiated an
appointment at appellee's office, and Pashby testified that appellee
stated it would be no use, and requested Pashby to give his son-in-
law so that the stock could be sold to some one else, but it looks
appellant that he (appellee) would then pay back loans to him. Appellee
admitted he had a conversation with Harry Pashby, Jr. but denied
he told him if there were any losses in selling the stock they
would pay them. Appellant testified that shortly after receiving
returned to complete his purchase, in fact he [illegible] all the
certificates and blank notes [illegible]. [illegible] but refused the certificate, stating that
appellee to my going in and I will buy the remainder". [illegible]
that testified that he had been at all times willing [illegible],
freely, willing and able to deliver to appellee these certificates.
Appellee testified that he had never seen these certificates, or any
the trial of this cause, and that they had never been in his
tendered to him.

It will be remembered that the evidence relative to the
of this stock consists of letters and telegrams
since that there was a small sum pending upon
Is it true that he now claims that he [illegible] this time the
purchase of appellant. This is [illegible] and the

contention is not sustained by the evidence. The contract was made with appellant, and the certificates evidencing the ownership of the stock were secured by him and issued to appellee. The questions as to whether or not there was a contract and if so what were its terms are questions of law for the court. It was the duty and function of the court in this case to construe this contract, and by proper instructions advise the jury of its meaning. Rosenbaumm. Brothers v. Davine, 271 Ill. 354. Hancock v. Knights of Security, 303 Ill. 86. It was therefore error for the court to refuse appellant's first instruction, which told the jury that as a matter of law the contract of sale in this case was made between the plaintiff and the defendant. Likewise, it was error for the court to give to the jury the fourth instruction offered by appellee which told the jury that if they believed from the grxxx greater weight of the evidence, that the defendant purchased this stock from the brother of the plaintiff, through the plaintiff as agent, and not from the plaintiff, then the jury should find the issues for the defendant.

During the trial improper remarks were made by counsel for appellee relative to appellant, and while we might hesitate to reverse this judgment solely for that reason, we wish to observe counsel should be governed by the ethics of the profession, and should have refrained from seeking to obtain a verdict by such unwarranted means.

In view of the fact the letters and telegrams show that there was a valid and binding contract entered into, and the terms thereof complied with by appellant, which appellee recognized, we are of the opinion the trial court erred in refusing the peremptory instruction offered by appellant at the close of all the evidence, directing a verdict for him.

Owing to the conclusion we have reached, this cause must be reversed, but as the evidence clearly discloses, the fact that appellant is entitled to a judgment, there is no reason why judgment should not be entered here.

must ebonit not be entered here.

obtaining it entitle D. a judgment. Where it on issue out issue received, but as the original circuit directors. [illegible] valuable', directing a verdict for him.

Owing to the ordinance of res ipsa loquitur, [illegible] another instruction offered by plaintiff to [illegible] be the of the opinion the jury shall in reference the instructed complied with by plaintiff, after carefully [illegible] me = Arlit and digital omitted against him', and the jury numerously cons'.

In view of the fact the injury was [illegible] upon the upon reformed from receipt to cancel = ancient to any appeal make reference from receipt to cancel = ancient to any consent should be entered by the notice of the testimony, and waive this judgment solely for that reason, as also to execute [illegible] relative to obtaining, may only to allow parties to

During the first judicial district [illegible] the [illegible] Jury should fix the terms for the payment.

Strictly the district as stood, and from the district, then [illegible] purchased this block from the estate of the district, [illegible] from the Bourse. Estate weight of the without, like the [illegible] consideration offered by plaintiff which fact that fact that it this time', it was right for the court to give to the jury the terms, [illegible] was made between the district and the [illegible]. Thereupon [illegible] for the court to refuse defendant's first instruction, [illegible] v. Knights of Security, 200 Ill. 61. It was therefore [illegible] meaning. Doorposts. Dresbach v. Davis, 61 Ill. 120. [illegible] this contract, may by broker instruction making the jury of and the duty may function of the court to [illegible] what were its terms are questions of law for the court. It [illegible] questions as to whether or not there was a contract and if so of the stock were secured by pledge and [illegible]. [illegible] may make ibbellant, and the certificate exhibited the [illegible] consideration is not sufficient by its express. [illegible]

In reaching this decision, we are not unmindful that it is claimed there is a question of fact involved relative to a tender. Appellant fully and completely complied with the contract on his part. Appellee gave as his excuse for failing to comply, that his wife did not want to buy any more oil stock. Appellee was willing to pay damages for the breach of the contract, as is indicated by the evidence. The judgment is therefore reversed and judgment will be entered here in favor of appellant and against appellee, for Two Thousand Dollars and interest thereon from January 25th, 1931, at five per cent together with the cost incurred by appellant in the circuit court and in this court. Interest, $260.00. Judgment for $2,260.00 and costs of suit. Execution may issue.

Reversed and judgment here.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of Oct. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 629

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to wit:

I

Genl. No.7216 Agenda 29.

Joe Stanilov, etc. for
the use of Warren Lewis,
Mortgagee,
Appellee,
vs.
Lincoln Mutual Casualty
Company,
Appellant.

Appeal from the Circuit
Court of Peoria County.

231 I.A. 629

Jett, J.

On April 4, 1921, appellee purchased of the Triangle Motor Sales Company of Peoria, an automobile, paying therefor $2660.00, a portion of the purchase price was paid in cash and appellee executed a note, secured by a chattel mortgage, for the balance of $2156.00. The negotiations were made on behalf of the Triangle Motor Sales Company by a salesman by the name of Broadhead. At the same time, appellee applied for insurance upon the automobile, his application therefor in the appellant company having been deliverd to Broadhead subsequently, and on April 8, 1921, a policy of insurance was issued and sent to appellee. On Saturday evening, July 2, 1921, appellee's car, covered by said policy was stolen while appellee was attending the Hippodrome Theatre in Peoria. Appellee immediately reported this theft to the Chief of Police and on the following morning about ten o'clock appellee notified Broadhead and Broadhead informed him that he would call the insurance company at Springfield. The next morning being Monday, Broadhead, according to the testimony of appellee, called appellant at Springfield over the phone from Peoria, but was unable to speak to the man he called for, subsequently and on either July 6th or 7th, appellant received a letter from appellee notifying it of the theft of the car. Several months thereafter the automobile was recovered and appellant having purchased the note secured by the chattel mortgage, foreclosed the same, and at the sale purchased the car for $1552.00. Appellant refused to pay the policy, denying any liability, and this suit was brought by appellee thereon.

by appellee thereon.

Accompanying the declaration, appellee filed an affidavit of claim, showing the nature of his demand and the amount claimed to be due. Appellant filed its affidavit of defense, setting up first that the car was not stolen; second, that plaintiff failed to give immediate notice of the theft; third, that appellee had made default in payment of the note secured by the chattel mortgage and that the car had been sold under the provisions thereof, which had worked a forfeiture of his right to recover under the policy.

Appellant has abandoned in this court the first and third defenses as set forth in its affidavit of defense, but insists that the judgment should be reversed, first, because appellee failed to give immeditate notice of the theft; second, appellee failed to furnish ~~ish~~ sworn proof of loss as required by the terms of the policy, and third, that the judgment is excessive.

Appellant is not in a position to insist upon its second contention, inasmuch as under Section 55 of our practice act a defendant must set forth his defenses in his affidavit of defense, and any other matters of defense are waived. Therefore, the question that appellee failed to furnish sworn proof of loss as required by the terms of the policy will not be considered. Miller v. Thomas, 200 Ill.App. 125, and cases there cited. Goddard Tool Company v. Crown Electrical Mfg. Co. 219 Ill. App. 34.

The policy upon which this suit is brought provided, viz: "In the event of loss or damage under this policy, the assured shall give the company at Springfield, Illinois, or a duly authorized agent immediate notice thereof, with the fullest information obtainable." It is strenuously insisted by counsel for appellant that under the authority of Gallagher v. American Alliance Insurance Co. 220 Ill. App. 476, there can be no recovery in this case. It is true that the giving of notice of the theft of the car is a condition precedent to the right of recovery, and as was said in the Gallagher case, "It was incumbent upon the plaintiff in the exercise of due diligence, to give

notice of his loss to defendant within a reasonable time." We believe the evidence in this record discloses that Broadhead was the agent of the company and it is undisputed that the loss was reported to Broadhead the following Sunday morning about ten o'clock. It is true the secretary and the General Manager of appellant testified positively that he, Broadhead, was not an agent or in the employ of the company, but he had a rate book of appellant, quoted rates of insurance for the company, accepted the application of appellee for this insurance and it was to him appellee paid the premium at the same time he paid him for the car. Furthermore, appellant did receive notice by means of a letter written by appellee to the company on July 8th. A provision in an insurance policy requiring the giving of "immediate notice" should be liberally construed and means that notice must only be given within a reasonable time under the circumstances of each particular case; that if the assured acts with due diligence and without unnecessary and unreasonable delay of which the jury are ordinarily the judges, the requirement will be met. Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Niagara Fire Ins. Co. v. Scammon, 100 Ill. 644; Scammon v. The Germania Ins. Co. 101 Ill. 621. In the case at bar the court properly instructed the jury at the request of both appellant and the appellee as to this feature of the case and this court is unable to say that under the evidence as found in this record the jury were not warranted in finding that there was a substantial compliance by appellee with this provision of the policy.

The contention of appellant that the judgment is excessive cannot be sustained. The policy was for $2400.00. The amount realized at the sale of the car at the foreclosure sale was $1532.00. The judgment is for the difference or $868.00.

The abstract prepared by counsel for appellant sufficiently presents the questions raised on this record and appellee's motion to tax the costs for printing the supplemental abstract which was taken with the case will be denied.

Finding no reversible error in the record, the judgment of the circuit court of Peoria county is affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 10th day of Oct. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

231 I.A. 629

BE IT REMEMBERED, that afterwards, to-wit: on SEP 7 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

L. C. Clyne, Trustee in Bankruptcy,

Defendant in error,

vs.

Perry J. Eychaner, et al,

Plaintiff in error,

Error to the Circuit Court of Kane County

231 I.A. 629

Jett, J.

The defendant in error as trustee in bankruptcy filed a bill to set aside a forfeiture declared by plaintiffs in error under a contract of sale of certain real estate between his bankrupt, John L. Perkins, and the said plaintiffs in error, and to recover $2500 part payment under the contract. There was a finding in favor of the defendant in error for the full amount and a writ of error is prosecuted.

The bill charged that on December 17, 1920, John J. Perkins was adjudged a bankrupt by the District Court of the United States for the Northern District of Illinois; on August 24, 1920, John J. Perkins entered into a contract in writing with plaintiffs in error, by the terms of which plaintiffs in error contracted to sell to the said John J. Perkins, and the said John J. Perkins contracted to buy certain premises mentioned and described in the contract.

It is further alleged plaintiffs in error agreed to convey to Perkins in fee simple, clear of all encumbrances, by warranty deed, the said property, and Perkins agreed to pay therefor the sum of $23,100 as follows: $2500 on the day of the execution of the contract, and the balance on or before January 15, 1921; said conveyance was to be made subject to a lien of a $5000 mortgage, and that after the execution of said contract said Perkins paid to plaintiffs in error $2500, being the first payment on the purchase price of the property. It is also alleged that after the execution of the contract Perkins took possession of the premises, caused a silo to be erected thereon at a cost of $800 and certain repairs to buildings on the premises and new and additional buildings amounting to $500;

D. C. Clyne, Trustee in
bankruptcy,

Defendant in error,

vs.

Perry T. Dykeman, et al,

Plaintiff in error,

Writ of Error to the Circuit Court

Clerk's Office.

Jett, J.

The defendant in error as trustee in bankruptcy filed a bill to set aside a forfeiture declared by plaintiff in error under a contract of sale of certain real estate between the parties, John I. Perkins, and the said plaintiff in error, and to recover $4000 part payment under the contract. There was a finding in favor of the defendant in error for the full amount and a writ of error is prosecuted.

The bill charged that on December 17, 1920, John I. Perkins was adjudged a bankrupt by the district court of the United States for the Northern District of Illinois; on August 26, 1920, John I. Perkins entered into a contract in writing with plaintiff in error, by the terms of which plaintiff in error contracted to sell to the said John I. Perkins, and the said John I. Perkins contracted to buy certain premises mentioned and described in the contract.

It is further alleged plaintiff in error agreed to convey to Perkins in fee simple, clear of all encumbrances, by warranty deed, the said property, and Perkins agreed to pay therefor the sum of $28,100 as follows: $2000 on the day of the execution of the contract, and the balance on or before January 15, 1921; said conveyance was to be made subject to a tax of a $6000 mortgage, and after the execution of said contract said Perkins paid to plaintiff in error $2000, being the first payment on the purchase price of the property. It is also alleged that after the execution of the contract Perkins took possession of the premises, erected a sign board thereon at a cost of $800 and certain repairs, [illegible] on the premises and new and additional building [illegible]:

that such improvements are of a permanent character, and increased the value of the premises to the extent of $1500; that said silo was constructed upon said premises under contract between Perkins and Frank S. Mason and R. A. Lawrence, co-partners, defendants to the bill, and the said Mason and Lawrence filed their claim for mechanics lien in the sum of $810, in the office of the clerk of the Circuit Court of Kane County, and the said claim for lien is still pending; on the 15th day of January, 1921, being the date upon which plaintiffs in error had contracted to convey said premises to Perkins, the bill alleges said premises were subject to various liens and encumbrances, and plaintiffs in error did not possess said premises free and clear of all encumbrances; that on the date last aforesaid plaintiffs in error caused a deed to be tendered to defendant in error purporting to convey the premises described in the contract. That said deed did not convey a merchantable title, and defendant in error, on that account, refused to accept said deed and pay the balance due on the purchase price, and demand was made on plaintiffs in error for the return of the $2500 which demand was refused; that on the 5th of February, 1921, plaintiffs in error attempted to forfeit said contract and retain as their own the initial payment of $2500 in full satisfaction of liquidation of damages.

Plaintiffs in error answered and admitted Perkins was adjudged a bankrupt, and Clyne was elected trustee; admitted contract was entered into and that the substance thereof is set forth in the bill of complaint; answer alleged that Perkins agreed to purchase from plaintiffs in error the real estate described therein for the sum of $23,100; that $2500 was to be paid in cash and the balance to be paid on or before January 15th, 1921, and that out of said balance so to be paid there should be deducted the sum of $5000, being the principal amount of the mortgage encumbrance against said real estate, which encumbrance said defendant in error was to assume and agreed to pay as a part of the consideration of the purchase price of said farm; that it is a part of said agreement that plaintiffs

in error should furnish the said Perkins, when the balance of the purchase price was paid, the same title as shown by abstract of title which was acquired by Perry J. Eschaner, plaintiff in error, when he acquired title and purchased the real estate, which title was then and there accepted by the said John J. Perkins; plaintiffs in error and said Perkins employed a scrivener to reduce their agreement to writing; that it was the mutual intention and understanding of the parties that said written agreement should incorporate and provide for the above terms of sale, and alleged that the scrivener was a justice of the peace, and drafted a written contract, in duplicate, and endeavored to incorporate therein the terms as above provided, and alleged that Perkins paid the sum of $2500, but denied that he ever took possession of said premises after the execution of said contract, averring that after making said contract Perkins asked permission from plaintiffs in error to erect a silo on said premises, and to do certain improvements thereon, and plaintiffs in error permitted said Perkins to go on said premises only for the purpose of building said silo and making certain improvements thereon.

The question to be determined arises on the bill and answer as above set forth. As we view the issues made by the pleadings in this cause the conclusion thereof rests on the legal construction to be given to the contract, of August 24, 1920. According to the evidence, this contract was drawn by a man by the name of Harter, a justice of the peace, who undertook to insert in the ordinary printed form of Articles of Agreement for a deed, language written in longhand for the purpose of setting forth what was the understanding of the parties as to the transfer of such title as they had according to an abstract, the said abstract then in the possession of the bank at Elburn.

The main point of contention is the proper construction to be given to the contract in controversy and especially under the two provisions which read as follows: First: "First parties (meaning plaintiffs in error) agree to convey to second party (meaning defendant in error) in fee simple, clear of all encumbrances whatever, by a good and sufficient warranty deed, the premises in question." The above

and sufficient warranty deed, the remainder in [illegible]."

and foregoing language was the printed provision found in the form of Articles of Agreement which the scrivener used in drafting the contract. Second: "Second party (meaning defendant in error) accepts abstract subject to a $5000 mortgage, which is deducted from principal." The language last above quoted was inserted in the contract by the scrivener in his own hand-writing. It is conceded that the word "excepts" as used in the above, was written instead of the word "accepts" as it should have been by the scrivener, so it is agreed by both parties that the second party (meaning defendant in error) accepted the abstract. To construe the above provisions we must keep in mind the fact that the contract was drafted by the justice of the peace who used a printed form of Articles of Agreement, in which was printed the phrase "First parties agree to convey to second party in fee simple, clear of all encumbrances whatever, by a good and sufficient warranty deed, the premises in question:" that the scrivener who drafted the contract inserted in his own handwriting the phrase "Second party accepts contract subject to a $5000 mortgage which is deducted from principal." and consider them in the light of the surrounding circumstances at the time the contract was entered into.

Plaintiffs in error testified when Perkins came to see them relative to buying the farm, they told him that he must accept their title as shown by the abstract; that they would be put to no expense in fixing up the title. They further testified that they told Perkins that the abstract was at the bank in Elburn, and that he could go there and see it if he so desired. This evidence stands in this record undenied.

The testimony further shows that about two weeks later when plaintiffs in error and Perkins went to the justice of the peace to have the contract in question drawn plaintiffs in error told Harter, the scrivener, that Perkins was to accept their title as shown by their abstract, but that the mortgage of $5000 was to be deducted fro the purchase price. Perkins was present at the time. Harter corroborated plaintiffs in error as to what was said at that

time relative to the terms of the contract and he testified that he intended in drawing the provisions of the contract to state the agreement as was understood at the time, and as plaintiffs in error told him in the presence of Perkins. Accordingly, Harter, as scrivener, wrote into each of the printed forms for the purpose of embodying the agreement of the parties concerning delivery of the abstract, these words, "Second party (Perkins) accepts contract subject to a $5000 mortgage which is deducted from principal."

It is insisted by defendant in error that the evidence offered by the plaintiffs in error showing what was said at the time they were first interviewed by Perkins with the view of purchasing the premises, and what was subsequently said in the presence of the justice of the peace and of Perkins, by the plaintiffs in error, is inadmissible and it was objected to by the defendant in error on the theory that it tended to vary the terms of the written instrument. Defendant in error cites numerous authorities to the effect that parol evidence is not admissible to vary the terms of a written contract. The testimony complained of by defendant in error was not offered for the purpose of in any manner varying the terms of the contract in question, but was heard to aid the court in construing the terms of the printed and written contract.

This testimony was prpper to better enable the court to construe the contract so as to carry into effect the intention of the parties. Parol evidence is always admissible for the purpose of explaining the surrounding circumstances which existed at the time the contract was made. In the case of Adams v. Gordon, 265 Ill. page 87, the court said: "The object in construing and interpreting an instrument is to ascertain and make it speak the true intention and meaning of the parties at the time it was made, and where any doubt exists as to its sense and meaning, resort may be had to the circumstances surrounding its execution, for the purpose of ascertaining the subject matter and the standpoint of the parties in relation thereto. Without this knowledge it would be impossible to fully understand the meaning of an instrument or the effect to be given to the words of which it is composed. (Goodwillie Co. v. Commonwealth Electric

time relative to the terms of the contract may be testified to
intended in drawing the provisions of the document to which the
agreement as was understood at the time, and as explained by every
told him in the presence of Perkins. Accordingly, Porter, as
scrivener, wrote into each of the printed forms for the purpose of
embodying the agreement of the parties concerning waivers of the
abstract, these words, "Seventy Barr (Perkins) accepts contract
subject to a $5000 mortgage which is deducted from principal."

It is insisted by defendant in error that the evidence offered
by the plaintiffs in error showing what was said at the time they
were first interviewed by Perkins with the view of purchasing the
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ject matter and the standpoint of the parties in relation thereto.
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the meaning of an instrument or the object to be attained by the terms
of which it is composed. (Goodwillie vs. V. [illegible]

Co., 241 Ill. 42). This knowledge is almost as indispensible as that of the language in which the instrument is written, and a reference to the actual condition of things at the times they appeared to the parties themselves will often afford the court great help in construing such language and arriving at the true intent and meaning of the agreement they have made."

Furthermore it should be borne in mind that the contract in question contained no provision requiring plaintiffs in error to furnish an abstract of title, the only provision in the contract in reference to an abstract being, "Second party accepts abstract;" Certainly by the insertion of this provision in the hand-writing of the scrivener it should be given the construction and meaning which the parties intended, and the evidence establishes the fact that it was the intention of Perkins to accept the title of the plaintiffs in error as shown by the abstract in question.

It will be remembered that this contract was written on a blank form found in the office of the justice of the peace, and is in printing and in the hand-writing of the justice. In construing the same if there is a conflict between the writing and the printed words the writing then controls. Where as in the use of printed form a contract is partly printed and partly written and there is a conflict between the printing and the writing the writing will prevail. 13 Corpus Juris 556, City of Chicago v. Weir, 165 Ill. 582.

We are of the opinion that after an examination of the evidence the true contract between the parties was that the title which plaintiffs in error had was to be accepted by Perkins and that the court was in error in holding otherwise. The trustee in bankruptcy had no greater rights than Perkins himself could have had, had he not gone into bankruptcy. Moreover to place the most favorable construction possible on the printed words in the contract relied upon by defendant in error, the most that could be said would be that it required plaintiffs in error to furnish a merchantable title. The undisputed evidence is that the plaintiffs in error have a title which for more than 25 years has never been disputed; so far as this record discloses there are no outstanding parties claiming

interest in the property. For more than 20 years the plaintiffs in error and their grantors have been in open, hostile and adverse possession paying all taxes during this period, and clearly under out Statute of Limitations have a good title by adverse possession. While it is true that parties may contract only to accept what is known as a perfect title of record which may be required to be shown by the abstract, the contract here involved contains no such provision.

In the case of Geithman v. Eichler, 265 Ill. page 583, the court said; "It (the contract) obligated appellants to convey a fee simple title free from encumbrances by warranty deed. This did not necessarily mean a perfect title of record, but meant a good merchantable title. A party may have such title to land notwithstanding apparent defects in the chain as shown by the record. For instance, the Statute of Limitations may make a title good which is apparently defective as shown by the chain abstracted from the record. There is no dispute upon these propositions and the citation of authorities we deem unnecessary."

We are convinced also from the evidence as disclosed in this record plaintiffs had a merchantable title sufficient to comply with the printed form of the Articles of Agreement, in and by which plaintiffs in error agreed to convey a fee simple clear of all encumbrances.

The decree in this cause directed that the plaintiffs in error should pay the defendant in error the sum of $810 which said sum defendant in error was to forthwith pay over to the defendants Mason and Lawrence for the amount of their claim for mechanics lien. There is no sufficient showing made to authorize the decree in this respect.

We conclude therefore that the decree should be reversed and the cause remanded, which is accordingly done.

Reversed and remanded.

Reversed and remanded.

Mr. Justice Jones dissenting:-

The opinion in this case rests upon the evidence admitted on the ground that there is an ambiguity in the terms of the contract. No rule of evidence is better settled than the one which declares that extrinsic evidence is not admissible either to contradict, vary, add to or take from the written terms of a contract. Written contracts, when not ambiguous, are not to have a construction placed upon them, other and different than the language employed will fairly import. In my judgment there is neither ambiguity nor contradiction in the terms of the contract in question. The language employed is not difficult to understand. It is only after incompetent evidence has been admitted that a construction can be given to such language, which raises the appearance of contradiction. Without the admission of this incompetent evidence there would be no difficulty encountered in construing the contract. The two provisions quoted in the opinion are not inharmonious. They can both be given effect according to the plain meaning of the language employed. There is no reason why resort should be had to extrinsic proof contrary to the well established rules of evidence, in order to place a construction upon the contract which does violence to the obvious intent of the parties, as expressed by the solemn language they used. The first provision requires the conveyance of a fee simple title clear of all encumbrances whatever. The second provision requires the second party to accept an abstract subject to a mortgage of $5,000, which is to be deducted from the principal. Looking at these two provisions alone and without resort to oral testimony, what confusion arises? Certainly the first provision has a meaning as clear as words can possibly express. And I hold that there is nothing in the second provision which casts any doubt upon the first. They can be easily read together and when so read together the conclusion which comes to me irresistibly is that the parties contemplated and intended that the vendor should convey a fee simple title subject, however, to a mortgage of $5,000 which amount the vendee was to deduct from the purchase price. The vendee

Justice Jones dissenting:-

was also to accept an abstract belonging to the vendor. This interpretation gives meaning and effect to every word contained in the contract. Such meaning is derived from the language employed and not from extraneous proof. It is unnecessary to define the term "abstract" as it is employed in this contract. Its definition is thoroughly understood by the members of the profession. The vendor had a right to stipulate that the vendee should accept his abstract without putting him to the trouble and expense of having another one made or his own brought down to date. Such expense and trouble he could impose upon the vendee with the latter's consent. Such purpose is expressed by this provision in unmistakable terms.

The endeavor is made to treat the word "abstract" as here used as meaning "title". There is no occasion for such endeavor but even if the term is to denote title, then it seems to me that this furnishes proof of the soundness of the contention, that the second provision does not contradict the first. I believe the Chancellor rendered a proper decree and for that reason I do not concur in the opinion in this case.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of Oct. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 530

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7232 Agenda 38

Gustave Beetz,

Appellant,

vs.

Fred W. Hartsburg,

Appellee,

Appeal from Circuit Court
of Kane County

231 I.A. 630

Jett, J.

This suit was instituted by appellant against appellee in the Circuit Court of Kane County, to recover the sum of $732.00 appellant claimed appellee owed him upon a certain contract, to which we will make reference hereafter. A trial was had before the court without the intervention of a jury, and the court found for the defendant and rendered judgment against appellant for costs of suit. This appeal followed.

Appellant and appellee were owners, respectively, of two certain pieces of real estate near the city of Aurora, in Kane County. Appellant did not have the legal title to his land, but had a contract, and by reason of which he had an interest of some value. The parties to the suit negotiated a trade of the lands; the Beetz land was known as the North May Street property, and the Hartsburg land was known as the New York Street Road Farm. In the trade of the land the May Street property was valued at $800.00, and the New York Street Road farm was valued at $2800.00; under the terms of the contract Beetz was to pay Hartsburg $2000.00. He was to pay $100.00, or more, each year thereafter, the interest on the deferred payments was to be at the rate of 6% per annum. Upon entering into the contract, Hartsburg took possession of the May Street property, and Beetz entered into possession of the New York Street Road property. This contract was entered into June 8, 1910, and the first payment was due July 1, 1911. Beetz was unable to meet this payment. On August 14, 1911, Hartsburg served Beetz with a notice by which he declared a forfeiture of the contract, and demanded possession of Beetz. Subsequent to this the parties got together, and Hartsburg told Beetz that he might find a purchaser, and if he could do so by November 1st, following, it would

Appeal from Circuit Court
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Appellant,

vs.

Fred M. Hartsburg,

Appellee,

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be satisfactory to him. Beetz employed a real estate agent, by the name of McDole, to find a purchaser, and McDole produced a man by the name of Crecelius, and pursuant to the understanding between the parties to this suit, Hartsburg and Crecelius entered into a contract, whereby Crecelius was to pay Hartsburg $100.00 cash, and $400.00 on November 1, 1911, the balance to be paid on or before five years after date, with seven per cent interest until $1000.00 was paid on the principal, when the interest was to be reduced to six per cent per annum.

The conduct of Hartsburg and Beetz, after the service of notice of forfeiture, undoubtedly waived the forfeiture. On the date of the contract between Hartsburg and Crecelius, Hartsburg executed a written instrument by which he fixed the interest of Beetz, under the original contract for the exchange of properties, at $732.00, and agreed to pay Beetz one half of all payments made by Crecelius under his contract, until such payments amounted to said sum of $732.00, but expressly provided that he assumed no personal obligation except one half of all sums which might be paid to him by Crecelius while his contract with the latter remained in force.

On November 1st, 1911, the parties met and there is some conflict between them as to what actually occurred on that occasion. This was the day named in the contract with Crecelius for the payment of $400.00 by him. It seems that Crecelius was willing to make such payment but Beetz refused to go on with the trade. Just how Beetz could interfere is not plain, because there had been no deed made to him, and the legal title to the New York Street Road Farm was still in Hartsburg, and the contract with Crecelius had been acquiesced in by Beetz, through his acceptance of the terms of the contract entered into between Hartsburg and Crecelius. Nevertheless, it appears that at this meeting Hartsburg and Crecelius made a memorandum endorsement on their original contract, rescinding the contract by mutual consent, and Hartsburg returned to Crecelius the $100.00 which he had paid thereon, and each party relieved the other from all liability under the cancelled contract. Hartsburg and Beetz also entered into a separate contract by which the contract was rescinded by mutual consent, and all liability thereunder cancelled.

was rescinded by mutual consent, and all liability thereunder cancelled. Beeta also entered into a separate contract by which the contract the other from all liability under the cancelled contract. Hartsburg Creselius the $100.00 which he had paid thereon, and case partly relieved and Creselius made a memorandum endorsement on their original contract, rescinding the contract by mutual consent, and Hartsburg returned to

acceptance of the terms of the contract entered into between Hartsburg and Creselius. Nevertheless, it appears that at this meeting Hartsburg contract with Creselius had been acquiesced in by Beeta, through his title to the New York Street Road Farm was still in Hartsburg, and the is not plain, because there had been no deed made to him, and the legal Beeta refused to go on with the trade. Just how Beeta could interfere by him. It seems that Creselius was willing to make such payment but the day named in the contract with Creselius for the payment of $400.00

between them as to what actually occurred on that occasion. This was On November 1st, 1911, the parties met and there is some conflict with the latter remained in force.

all sums which might be paid to him by Creselius while his contract provided that he assumed no personal obligation except one half of until such payments amounted to said sum of $733.00, but expressly Beeta one half of all payments made by Creselius under his contract, contract for the exchange of properties, at $733.00, and agreed to pay instrument by which he fixed the interest of Beeta, under the original contract between Hartsburg and Creselius, Hartsburg executed a written of forfeiture, undoubtedly waived the forfeiture. On the date of the

The conduct of Hartsburg and Beeta, after the service of notice

date, with seven per cent interest until $1000.00 was paid on the principal, when the interest was to be reduced to six per cent per annum. November 1, 1911, the balance to be paid on or before five years after whereby Creselius was to pay Hartsburg $100.00 cash, and $400.00 on parties to this suit, Hartsburg and Creselius entered into a contract, the name of Creselius, and pursuant to the understanding between the name of Modole, to find a purchaser, and Modole produced a man by be satisfactory to him. Beeta employed a real estate agent, by the

This exhibit was first offered by appellee and was then withdrawn. Thereupon, appellant offered it and the same was admitted in evidence. We are unable to understand why the appellant offered this contract, entered into by himself and appellee. It appears to be an absolute release of all liability of appellee, and there is nothing in the evidence to impeach it. Since it is based upon a valuable consideration we conclude that it is decisive of the case, and defeats the right of recovery by appellant. Another feature of the case which we are unable to understand is that on November 1st, when the meeting took place between the parties, viz; Crecelius, Beetz and Hartsburg, Beetz had the unquestioned right to $732.00 out of payments to be made by Crecelius. It represented all that Beetz had in the May Street property. He could get it only by having the deal with Crecelius concluded, and yet he refused to permit the trade to go through, and signed an absolute release of all liability under the contract. Another strange feature is that Beetz delivered up possession of the premises, to Crecelius, and apparently withdrew from all connection with the deal. Crecelius afterwards made a few payments, then another trade was made whereby a man by the name of Cooper became the owner.

This suit followed, with the result as heretofore stated. A number of propisitions of law were submitted by appellant, and all were refused by the court. From our understanding of the record, we are of the opinion the court committed no error in the refusal of any of them. The judgment of the Circuit Court is affirmed.

Judgment Affirmed.

Judgment Affirmed.

The judgment of the Circuit Court is affirmed. We are of the opinion the court committed no error in the refusal of any of them. From our understanding of the record, we were refused by the court. A number of propositions of law were submitted by appellant, and all

This suit followed, with the result as heretofore stated. A was made whereby a man by the name of Cooper became the owner. deal. Creselius afterwards made a few payments, then another trade to Creselius, and apparently withdrew from all connection with the strange feature is that Beets delivered no possession of the premises, and yet be refused to permit the trade to go through, and signed an absolute release of all liability under the contract. Another ed, party. He could get it only by having the deal with Creselius complet- Creselius. It represented all that Beets had in the May Street pro- had the undersigned right to $733.00 out of payments to be made by place between the parties, viz; Creselius, Beets and Hartsburg, Beets able to understand is that on November 1st, when the meeting took recovery by appellant. Another feature of the case which we are un- we conclude that it is decisive of the case, and defeats the right of dence to impeach it. Since it is based upon a valuable consideration release of all liability of appellee, and there is nothing in the evi- entered into by himself and appellee. It appears to be an absolute We are unable to understand why the appellant offered this contract, Thereupon, appellant offered it and the same was admitted in evidence. This exhibit was first offered by appellee and was then withdrawn.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of Oct. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 630

BE IT REMEMBERED, that afterwards, to-wit: On SEP 7 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

I

7235 Agenda 41.

Robert J. Erskine,
Appellee,

vs.

James Morrow,
Appellant.

Appeal from
the Circuit Court
of Lake County.

Jett, J. 231 I.A. 630

This is a suit brought by Robert J. Erskine, appellee, a real estate agent against James Morrow, appellant, to recover a commission of five percent in bringing about the sale to the Public Service Company of Northern Illinois, of eighty-five and a fraction acres of land bordering Lake Michigan in Lake County at one thousand dollars per acre.

A jury trial was had resulting in a verdict finding "The issues in favor of the plaintiff and assessing his damages at $4250.00 with interest at five per cent from May 3, 1920, a total of $4832.60." Upon this verdict judgment was rendered for $4832.60 and appellant appeals.

The evidence discloses that in September 1919, appellant executed a ninety day option covering the land in favor of a party named by the Public Service Company of Northern Illinois. This option was renewed several times and on May 3, 1920, in pursuance of its terms, a contract of sale was entered into by the terms of which appellant received at that time $6500.00 and the deed to said premises was then deposited in escrow with the Chicago Title and Trust Company, there to remain until the deferred payments aggregating in all $85676.00 were made.

It is first insisted that the jury erred in computing interest from May 3, 1920, as there had been no settlement of account between the parties, appellant at all times, denying that he was indebted to appellee in any amount. If, however, appellee was entitled to any commission at all, he had earned

Appeal from the Circuit Court of Lake County.

Appellee.

vs.

James Morrow,

Appellant.

Robert T. Perkins,

7283

Mr. Justice Dibell delivered the opinion of the court.

This is a suit brought by Robert T. Perkins, appellee, a real estate agent against James Morrow, appellant, to recover a commission of five percent in bringing about the sale to the Public Service Company of Northern Illinois, of eighty-five and a fraction acres of land bordering Lake Michigan in Lake County at one thousand dollars per acre.

A jury trial was had resulting in a verdict finding "The issues in favor of the plaintiff and assessing his damages at $4250.00 with interest at five per cent from May 5, 1920, a total of $4882.50." Upon this verdict judgment was rendered for $4882.50 and appellant appeals.

The evidence discloses that in September 1919, appellant executed a ninety day option covering the land in favor of a party named by the Public Service Company of Northern Illinois. This option was renewed several times and on May 5, 1920, in consideration of its terms, a contract of sale was entered into by the terms of which appellant received at that time $6500.00 and the deed to said premises was then deposited in escrow with the Chicago Title and Trust Company, there to remain until the deferred payments aggregating in all $8500.00 were made.

It is first insisted that the jury erred in computing interest from May 5, 1920, as the sale had been no settlement of account between the parties, appellant at all times, denying that he was indebted to appellee in any amount. It, however, appellee was entitled to any commission at all, as he was

it on May 3, 1920, the day the appellant entered into the contract of sale with the Public Service Company and placed the deed to the property in escrow. Fox vs. Ryan 240 Ill. 391. Therefore it was not error for the jury to compute the interest as it did.

It is next contended that the verdict of the jury is contrary to the weight of the evidence and counsel for appellant points out that the dispute arises over whether or not appellee was acting as agent for the Public Service Company or for the appellant. This was a question of fact. Appellant testified that he inquired of appellee whether or not he was the agent of the Public Service Company and he said he was but appellee denied this, and testified positively that he had a definite oral contract with appellant as to the amount he was to receive from him for his services; appellant denied this contention of appellee and was, in some respects corroborated by his son, Walter Morrow. The district manager of the Public Service Company testified that had appellee been its agent or was paid or was to be paid by the Public Service Company, such facts would be disclosed by his books and it nowhere so appeared.

Appellee was further corroborated by the testimony of Edgar B. Elders, a lawyer representing the purchaser who testified that he prepared the original option contract while the parties hereto were in his office: that in response to a question as to whether there was anything further to be inserted in the option agreement, appellee said there should be something said about his commission to which Elders in the presence of Morrow said that was a matter in which the Public Service Company was not interested, but was a matter for appellee and appellant to settle among themselves: that appellant made no reply, but appellee said "all right."

appellee said "all right."

The evidence further shows that at the time the final contract was made and the deed placed in escrow, appellee was present and then and there insisted upon his commission being paid him.

In this condition of the record it was peculiarly the province of the jury to determine the controversy; they saw the witnesses, no doubt they observed their conduct and hearing and they had far superior advantages to determine who were and who were not testifying truthfully than this court has. Eggman vs. Nutter, 169 Ill. App. 116-119. It is only the duty of an appellate court to reverse a judgment when the verdict upon which it is based is clearly and manifestly against the evidence. There are many facts in this record corroborating appellee's claim and it certainly cannot be said that the verdict is clearly and manifestly against the weight of the evidence. No complaint is made of any of the trial courts rulings upon the admission or rejection of evidence and there is no objection to the court's instructions other than one as to interest which we have noticed and the 8th given instruction but it is not pointed out wherein itwas prejudicial or erroneous.

Appellant suggests that he thinks it is erroneous and prejudicial. We are of the opinion the rights of appellant were not prejudiced by the 8th given instruction.

Finding no reversible error in the record, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of Oct. in the year of our Lord one thousand nine hundred and twenty-three.

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

2311.A.630

BE IT REMEMBERED, that afterwards, to-wit: On SEP 7 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

I

General Number 7I88 Agenda No. I2

Fred B. Elgin, Defendant in Error

vs.

Winifred L. Elgin, Plaitiff in Error

Error to Circuit Court of Peoria County.

Jones J.

231 I.A. 620

This cause was brought to this Court by writ of error to review a decree for divorce granted Fred B. Elgin, the defendant in error. The bill charge ~~xxxxxx~~d extreme and repe ated cruelty. The specific acts of cruelty alleged against the plaintiff in error, Winifred L. Elgin, are that on December I7, I9I9, she struck defendant in error in the face; that on January I, I920 she struck him in the face and otherwise ill-treated him, and on numerous other occasions she had been guilty of ill-treating him and thus rendered his life miserable.

The parties to this suit were married December 8, I9I9 and lived at Peoria, Illinois, in a home owned by the defendant in error until January, 3I, I920, when they separated. During the time they lived to ether the family consisted of the parties to this proceeding, a son of the plaintiff in error and two nieces of the defendant in error. The husband was an employee in the post office department at Peoria. The wife was an employee in a telephone exchange. This was the second marriage for each of them. The husband was about forty-eight years old and weighed about one hundred forty-eight pounds. The record does not disclose the age of the wife. Her weight was about one hundred five pounds.

The cause was tried by the court without a jury and the testimony tends to show that Mrs. Elgin is a woman of highly irritable disposition; that she was extremely jealous of her husband and repeatedly made accusations against him which do not appear to be warranted by the facts; that she was in the habit of becoming enraged at him without any sufficient cause; that she continually scolded and found fault with him; that she struck him, not only upon the occasions charged in the bill but on other oc-

General Number 1283

Ira B. Elgin, Defendant in Error

vs.

Error to Circuit Court of Peoria County.

Jones J.

This cause was brought to this Court by writ of error to review a decree for divorce granted Ira B. Elgin, the defendant in error. The bill charge extreme and repeated cruelty. The specific acts of cruelty alleged against the plaintiff in error, Winifred L. Elgin, are that on December 17, 1919, she struck defendant in error in the face; that on January 1, 1920 she struck him in the face and otherwise ill-treated him, and on numerous other occasions she had been guilty of ill-treating him and thereby rendered his life miserable.

The parties to this suit were married December 3, 1919 and lived at Peoria, Illinois, in a home owned by the defendant in error until January 31, 1920, when they separated. During the time they lived together the family consisted of the parties to this proceeding, a son of the plaintiff in error and two nieces of the defendant in error. The defendant was an employee in the city office department at Peoria. The wife was an employee in a telephone exchange. This was the second marriage for each of them. The husband was about forty-eight years old and weighed about one hundred forty-eight pounds. The record does not disclose the age of the wife. Her weight was about one hundred five pounds.

The cause was tried by the court without a jury, the testimony tends to show that Mrs. Elgin is a woman of highly excitable disposition; that she was excessively jealous of her husband and repeatedly made accusations against him which were not only not to be warranted by the facts; that she was in the habit of becoming enraged at him without any sufficient cause; that she frequently scolded and found fault with him; that she struck him not only upon the occasions charged in the bill but on other occasions

casions as well; that she was guilty of this misconduct in the presence of the little girls above refered to;on one occasion she struck him in the presence of his brother and upon another occasion, in the presence of his mother. In the moments of her rage she threatened to kill him. She found fault with the home in which they lived and the neighborhood in which it was loc ted. Her general demeanor, beginning four or five days after they were married, was decidedly intolerable. Upon thetrial the chancellor endeavored to see if there was any chance of a reconciliation. He was informed by the plaintiff in error that she did not want him to compel her to again live with her husband and that if her husband came back to her she would quarrel with. him and that she couldn't help it.

There is no necessity for citing authorities in support of the decree of the chancellor in this case. It was clearly warranted by the evidence, and it would be an injustice to the defendant in error and no benefit to society to reverse the decree. The decree is therefore affirmed.

Decree affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of Oct. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A.

BE IT REMEMBERED, that afterwards, to-wit: On SEP 7 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 7198 Agenda No. 18

George Barrett,

Appellant,

vs. Appeal from Circuit Court

The Farmer's Grain, Live Stock and Coal Association, of Woodford.

Appellee,

231 I. 630

Jones, J.

The appellant was the plaintiff and the appellee was the defendant in the trial court. The declaration was the common counts with which was filed an affidavit of merits. Plaintiff's claim is for $953.31 on account of corn sold and delivered to the defendant by the plaintiff. The defendant filed two pleas. The first plea was non assumpsit as to all sums in excess of $727.11. The second plea was a plea of tender as to $727.11 and non assumpsit as to all sums in excess of that amount. An affidavit of defense was filed with these pleas. The replication to the second plea did not traverse the alleged tender but averred that the amount alleged to have been tendered was a lesser amount than was due the plaintiff.

On December 21, 1921, the plaintiff, George Barrett, was the owner of 1823 bushels and 49 pounds of corn in the elevator of the defendant. The plaintiff's wife Lizzie M. Barrett, acted as the agent for the plaintiff with reference to its sale. She called the defendant over the telephone on January 33, 1922 and inquired the price of corn. She was told that it was 39¢ per bushel. She declined to sell at that time for less than 40¢ per bushel. On January 31st or February 1st, she again called the defendant over the telephone and inquired the price. She was told that it was not over 39½¢ per bushel. This conversation was had with Mark Marshall who was in charge of defendant's elevator at the time. Mrs. Barrett's version of the conversation is that she asked what was being paid for corn. When she was told that the price was 39¢ she said she would not take less than 40¢ if it would grade No. 3; that Marshall then inquired if she would take 40¢, if the corn could be worked

Gen. No. 7193

George Barnett,

Appellant,

vs.

The Farmer's Grain, Live Stock and Coal Association,

Appellee,

Appeal from Circuit Court of Woolford.

Agency No. 12

Jones, J.

The appellant was the plaintiff and the appellee was the defendant in the trial court. The declaration was the common counts with which was filed an affidavit of merits. Plaintiff's claim is for $853.31 on account of corn sold and delivered to the defendant by the plaintiff. The defendant filed two pleas. The first plea was non assumpsit as to all sums in excess of $727.11. The second plea was a plea of tender as to $727.11 and non assumpsit as to all sums in excess of that amount. An affidavit of defense was filed with these pleas. The replication to the second plea did not traverse the alleged tender but averred that the amount alleged to have been tendered was a lesser amount than was due the plaintiff.

On December 21, 1921, the plaintiff, George Barnett, was the owner of 1523 bushels and 49 pounds of corn in the elevator of the defendant. The plaintiff's wife Lizzie V. Barnett, acted as the agent for the plaintiff with reference to its sale. She called the defendant over the telephone on January 23, 1922 and inquired the price of corn. She was told that it was 37¢ per bushel. The intended to sell at that time for less than 40¢ per bushel. On January 31st or February 1st, she again called the defendant over the telephone and inquired the price. She was told that it was not over 39½¢ per bushel. This conversation was had with Mark Marshall who was in charge of defendant's elevator at the time. Mrs. Barnett's version of the conversation is that she asked what was being paid for corn. When she was told that the price was 39¢ she said she would not take less than 40¢ if it would break No. 3; that Marshall then inquired if she would take 40¢, if the corn could be worked

off that day; that she replied, "Yes, but call up to-day and let us know";and that she received no call that day. Marshall's version of this conversation is that in answer to her inquiry as to the price of corn, he replied 39½¢ per bushel; that Mrs. Barrett then said she would let it go if she could get 40¢, and directed him to ship it out whenever he could pay her that price and to send her a check. Marshall denied that Mrs. Barrett ever asked him to call her over the telephone to let her know on the day of the above conversation whether or not the corn had been sold. Mrs. Barrett denied she told Marshall to ship it out whenever he could pay 40¢ per bushel.

On February 8th, the defendant shipped out the corn and as soon thereafter as returns were received showing the grade, a check for $787.11 was mailed to plaintiff. The amount of the check was the price of the corn at 40¢ per bushel, less an insurance charge of $2.43. Plaintiff declined to accept the check on the ground that the corn was not sold to the defendant at 40¢ a bushel pursuant to the conversation had on January 31st, but was sold to the defendant on April 24th, at 52½¢ a bushel. The claim of plaintiff in reference to this alleged sale on April 24th, is based upon the testimony of John King, who was acting as an agent for plaintiff and who testified that on said last mentioned date he called at the elevator of the defendant and ascertained that the price of corn was 52½¢ per bushel. He testified that he then said "All right I'll sell Barrett's corn". He does not claim that the defendant's manager made any definite statement to the effect that he would buy the corn. King admitted that defendant's manager told him to have Mrs. Barrett come in and they would settle for the same, and he also admitted that the manager said something about the corn having already been sold to the defendant. The cause was submitted to a jury and a verdict was returned in favor of the defendant. Judgment was rendered upon the verdict and this appeal follows.

We think the evidence wholly fails to establish a sale of the corn at 52½¢ per bushel. Whether Mrs. Barrett's version of the conversation or Marshall's version of it is correct, was a question

off that day; that she replied, "Yes, but call me to-day and let me know";and that she received no call that day. Marshall's version of this conversation is that in answer to her inquiry as to the price of corn, he replied 39½¢ per bushel; that Mrs. Barrett then said she would let it go if she could get 40¢, and directed him to ship it out whenever he could pay per that price and to send her a check. Marshall denied that Mrs. Barrett ever asked him to call her over the telephone la let her know on the day of the above conversation whether or not the corn had been sold. Mrs. Barrett denied she told Marshall to ship it out whenever he could pay 40¢ per bushel.

On February 8th, the defendant shipped out the corn and he soon thereafter as returns were received showing the grade, a check for $738.11 was mailed to plaintiff. The amount of the check was the price of the corn at 40¢ per bushel, less an insurance charge of $3.43. Plaintiff declined to accept the check on the ground that the corn was not sold to the defendant at 40¢ a bushel pursuant to the conversation had on January 31st, but was sold to the defendant on April 24th, at 39½¢ a bushel. The claim of plaintiff in reference to this alleged sale on April 24th, is based upon the testimony of John King, who was acting as an agent for plaintiff and who testified that on said last mentioned date he called at the elevator of the defendant and ascertained that the price of corn was 39½¢ per bushel. He testified that he then said "All right I'll sell Barrett's corn". He does not claim that the defendant's manager made any definite statement to the effect that he would buy the corn. King admitted that defendant's manager told him to have Mrs. Barrett come in and they would settle for the same, and he also admitted that the manager said something about the corn having already been sold to the defendant. The cause was submitted to a jury and a verdict was returned in favor of the defendant. Judgment was entered upon the verdict and [illegible] appeal follows.

We think the evidence wholly fails to establish a sale of the corn at 39½¢ per bushel. Whether Mrs. Barrett's version of the conversation or Marshall's version of it is correct, was a question

for the jury. The jury accepted Marshall's version and we are not disposed to disturb its finding. Indeed, the record impresses us with the belief that the corn was being held in storage at defendant's elevator for the purpose of obtaining 40¢ a bushel for it; that it was the intention of the plaintiff to sell it whenever that price could be obtained, and that a sale was in fact made at such price.

Appellant urges that there was no sufficient proof of tender. We are of the opinion that the tender was sufficiently made and proven. It is admitted that the defendant sent a check to the plaintiff for the price of the corn computed at 40¢ a bushel less, however, a small insurance charge. The check was refused because the plaintiff claimed a larger amount. When payment of a debt is tendered by a check and no objection is made as to the form of the tender, but the tender is refused on other grounds, complaint cannot be made thereafter because of the form of the tender. The general rule is that an objection to a tender of a bank check, if made upon some other ground than that it is not a legal tender, estops the objector from thereafter making an objection on the ground that it is not a legal tender. (Gillespie vs. Fulton Oil and Gas Company 230 Ill. 188; Gradle vs. Warner, 140 Ill.123; 38 Cyc. 146). After suit was brought, the defendant filed its plea of tender and made the tender good by depositing with the clerk of the court the sum mentioned in the plea. Under the facts the tender was sufficiently established. There is another reason why plaintiff ought not to be heard to complain on account of payment being tendered by check. If the testimony of Marshall is to be credited, then payment was directed to be made in that way.

Appellant complains of certain instructions given by the court on behalf of the defendant and also of the court's refusal to give certain instructions tendered on behalf of the appellant. We have examined these instructions and are of the opinion that the court's action in reference thereto is not so variant from the views here expressed as to make it any serious ground of error. The judgment of the trial court is affirmed.

Judgment Affirmed.

Mem.

for the jury. The jury accepted Marshall's version and we are not disposed to disturb its finding. Indeed, the record indicates we with the belief that the corn was being held in storage at Slater-Hunt's elevator for the purpose of obtaining 40¢ a bushel for it; that it was the intention of the plaintiff to sell it whenever that price could be obtained, and that a sale was in fact made at such price.

Appellant urges that there was no sufficient proof of tender. We are of the opinion that the tender was sufficiently made and proven. It is admitted that the defendant sent a check to the plaintiff for the price of the corn computed at 40¢ a bushel less, however, a small insurance charge. The check was refused because the plaintiff claimed a larger amount. When payment of a debt is tendered by a check and no objection is made as to the form of the tender, but the tender is refused on other grounds, complaint cannot be made thereafter because of the form of the tender. The general rule is that an objection to a tender of a bank check, if made upon some other ground than that it is not a legal tender, cadops the objector from the matter making an objection on the ground that it is not a legal tender. (Illinois va. Fulton Oil and Gas Company 230 Ill. 188; Grazis va. Warner, 180 Ill.153; 38 Dyo. 146). After suit was brought, the defendant filed its plea of tender and made the tender good by depositing with the clerk of the court the sum mentioned in the plea. Under the facts the tender was sufficiently established. There is another reason why plaintiff ought not to be heard to complain on account of payment being tendered by check. If the testimony of Marshall is to be credited, then payment was directed to be made in that way.

Appellant complains of certain instructions given by the court on behalf of the defendant and also of the court's refusal to give certain instructions tendered on behalf of the appellant. We have examined these instructions and are of the opinion that the court's action in reference thereto is not so variant from the views expressed as to make it any serious ground of error. The judgment of the trial court is affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of Oct. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of April, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 IA 630

BE IT REMEMBERED, that afterwards, to-wit: On SEP 7 1923 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Agenda No. 21 Genrpal No. 7203

Ellen C. Halladay,
Appellee

vs. Appeal from Marshall

The Estate of Ellen C. Blair,
Deceased, Appellant.

Jones J. 231 I.A. 630

It is unnecessary for us to make a full statement of this case because it was before us at the April term, 1921, and was then reversed and remanded. Halladay vs. Blair, 223 Ill. App. 609. Since then it was again tried in the circuit court and a judgment was rendered on a verdict of the jury in favor of the claimant for $2685 and costs.

In our former opinion we held that where an affidavit is filed by a defendant under Section "52" of the Practice Act, denying the making and delivery of notes sued on, the burden of proof is cast upon the plaintiff as to such questions. It was the contention of the defendant not only that the signatures on the notes were forgeries but also that there was no delivery of the notes. Both of these questions were put in issue by the affidavit.

The genuine~~ness~~ of the signatures was sought to be established mainly by comparison of the alleged signatures on the notes with signatures on other instruments which were admitted or proven to be ~~a~~ genuine signatures of the decedent, Ellen C. Blair. Claimant produced only one witness who testified that in his opinion the signatures to the notes were in the handwriting of Ellen C. Blair. The notes ~~were in the hands of the~~ sued on together with the exhibits containing her genuine signatures were certified to this Court for inspection.

The claimant is a daughter of the deceased and is the wife of a mine mechanic. Although her counsel endeavored to show the financial condition of the claimant and her mother during and after the period when the notes are alleged to have been given, it does not appear that the claimant was possessed of any property whatsoever unless it was the money which she claims she ~~pro~~

Milan G. Melladay,
Appellee

vs.

The Estate of Milan G. Blair,
Deceased, Appellant.

June 7.

loaned to her mother and for which the notes are alleged to have been given. She was not a resident of the same town as was her mother and while there is some proof that she occasionally visited her mother, such visits seem to have been made at irregular and somewhat long intervals and were mostly during the latter part of her mother's life. The notes are alleged to have been given at various times from and after October 20, 1916, which was approximately four years before the death of the mother. There are nineteen notes in all and there is a space of about two months between each note and the succeeding note.

It appears from the evidence that the mother of claimant owned a good farm near Lacon in Marshall County and she also owned her residence property in the city of Lacon. The evidence tends to show that the only existing indebtedness against her at the time of her death was a note of $5000 secured by a mortgage on her farm, unless the claim here is a valid indebtedness.

As we have already stated there was only one witness who testified that in his opinion the signatures to the notes were the genuine signatures of Ellen C. Blair. This witness was John Iliff who rented a farm from Mrs. Blair in 1909 under a written lease. He had seen her sign the lease and identified her signature to it on the trial. This instrument was then admitted as a standard of comparison. Without any further testimony from this witness as to his knowledge of the handwriting of Mrs. Blair, he was asked to give his opinion as to the genuineness of the signatures attached to other documents in evidence. Upon objection the Court ruled that there was no sufficient foundation laid for such testimony. The witness was then asked if he was acquainted with the signature of Ellen C. Blair and he replied in the affirmative. He was then permitted to give his opinion as to the genuineness of certain disputed signatures including those on the notes. He testified that he believed the signatures to be the genuine signatures of Mrs. Blair.

The ruling in admitting the testimony of this witness is assigned as error. The court comitted no error in admitting this evidence. It has been held that a witness may be qualified

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owned a good farm near Decatur in Macon County and she also owned
her residence property in the city of Decatur. The evidence tends
to show that the only existing indebtedness against her at the
time of her death was a note of $3000 secured by a mortgage on
her farm, unless the claim here in question.

As we have already stated there was only one witness who
testified in behalf of Mrs. Blair. Mary E. Clift, a daughter of
Mrs. Blair, testified that she had been acquainted with the
signature of her mother and while there is some proof that she occasionally visit-
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and somewhat long intervals and were mostly during the latter
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between each note and the succeeding note.

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to give his opinion as to whether or not a signature is genuine, although he saw the person write only on a single occasion several years before the date of the trial. Woodford vs. McClenahan, 9 Ill. 85; Massey vs. Farmers National Bank 104 Ill. 327. In ruling on the admissibility of this evidence the court merely passed upon its competency and not upon the weight or credit to be given to it.

In addition to certain exhibits which were offered as standards of comparison, the defendant produced three witnesses. One was James I. Ennis, an attorney at law, of Chicago and a professional handwriting expert. He testified to his examination of the notes under ordinary reading glasses, then with low powered magnifying glasses and then with high powered magnifying glasses. He also testified to certain other tests he made and gave it as his conslusion that the signatures were forgeries and were all "traced carbon signatures" and were made by tracing over a genuine signature with a pencil or stylus.

Another witness was Frank E. Wilson, who had been engaged in the farm loan business with the John I. Thompson Company of Lacon for 28 years. He had had experience in the examination containing signatures on notes, checks and other documents. He had been acquainted with Ellen C. Blair for 25 years, had transacted business with her from 1915 down until the time of her death and was familiar with her handwriting. He gave it as his opinion that the signatures on the notes were not genuine and that he believed at least some of them were traced signatures.

The third witness was Tracey Hancock, cashier of the First National Bank of Lacon. He had been connected with that bank for upwards of 15 years. He was acquainted with the handwriting of the customers of the bank, of whom Ellen C. Blair was one. He knew her and was able to distinguish her handwriting when he saw it. He had seen her write on anaverage of once a month during the period he had been employed in the bank. He gave it as his opinion that she did not sign the notes in question.

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He also testified to certain other tests he made and gave in his
opinion concerning that the signatures were forgeries and were all
"traced carbon signatures" and were made by drawing over a genuine
signature with a pencil or stylus.

Another witness was Frank K. Wilson, who had been employed in the Farm Loan business with the bank I. Chicopee Deposit of Lacon for 28 years. He had had experience in the examination concerning signatures on notes, checks and other documents. He had been acquainted with Milton G. Blair for 15 years, had transacted business with her from 1913 down until the time of her death and was familiar with her handwriting. He gave it as his opinion that the signatures on the notes were not genuine and were traced at least some of them were traced signatures.

The third witness was the only witness, another of the First National Bank of Lacon. He had been connected with that bank for upwards of 15 years. He was acquainted with the handwriting of the customers of the bank, of which Milton G. Blair was one. He knew her and was able to distinguish her [illegible] when he saw it. He had been her [illegible] for a period of [illegible] months during [illegible] had been employed in the bank. He gave it as his opinion that the [illegible]

After a very careful examination of the testimony of all the witnesses and of the exhibits which have been certified to us for inspection, we have reached the conclusion that the signatures on the notes in question are not the genuine signatures of Ellen C. Blair and that the verdict of the jury upon this question is manifestly against the weight of the evidence.

In our former opinion we held that the claimant was not a competent witness to testify that she had had possession of all the notes at all times from her mother's death until she delivered them to her attorney for the purpose of filing them as a claim against her mother's estate. We said on page "612" that she could not be permitted to testify to facts and circumstances which occured during the life time of the decedent even though the effort was made by a skillfully framed indirect interrogatory. We also said that without this testimony of claimant there is nothing in the record tending to prove a delivery of the notes. There is nothing in the evidence in the present record tending to prove such delivery. An attempt was made to furnish such proof by the testimony of one of the attorneys in the case, who stated that some time after the death of Ellen C. Blair, the claimant brought to him the notes in question for suit. He was unable to state the time when the notes were brought to him and there is nothing in his testimony tending either to prove the genuineness of the signatures or the delivery of the notes to the claimant by her mother.

Error has been assigned by appellant because of the conduct of claimant's attorney during the progress of the trial. It is pointed out that he made repeated attempts to get before the jury, matters which were held to be improper and incompetent by this court on the former hearing and matters which were held to be incompetent by the trial judge on the last hearing, that he insisted upon presenting such matters to the jury even after the trial court had made its rulings. It is altogether unnecessary for us to criticise such conduct. We are sure that claimant's attorney can not fail to see his error.

For the reasons herein stated this cause is reversed with a finding of facts as follows :

with a finding of facts as follows :

We find that the signatures to the notes which are the basis of appellee's claim are not the genuine signatures of Ellen C. Blair, deceased; that there was never any delivery of said notes by the said decedent to the said claimant and that none of the said notes were ever made, executed and delivered by the said Ellen C. Blair to the claimant or to anyone else for her.

Reversed and Remanded
with a finding of fact.

We find that the circumstances in the cases which are the basis of appellee's claim to not the pending objections of Allen O. Blair, deceased; that there was never any delivery of said notes by the said deceased to the said Clement and that none of the said notes were ever made, executed and delivered by the said Allen O. Blair to the claimant or to anyone else for her.

Reversed and remanded with a finding of facts.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 20th day of Oct, in the year of our Lord one thousand nine hundred and twenty-third

Justus L. Johnson

Clerk of the Appellate Court.

7069 (3381)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 681

Opinion Filed Oct. 18, 1923.

Gen. No. 7069 Agenda No.50.

Elizabeth Warren,

Plaintiff in error,

vs. Error to Peoria.

Grand Lodge of Brotherhood
of Railroad Trainmen,

Defendant in error,

231 I.A. 631

Jett, J.

On February 10, 1909, the Grand Lodge of Brotherhood of Railroad Trainmen issued a beneficiary certificate to Robert W. Warren, which entitled him to certain benefits in case of his total disability and to the payment of certain benefits to his wife if he died and she was living. Warren, having died on July 29, 1917, his wife brought this suit to recover on said certificate. Her declaration consisted of a single count which set forth the certificate in haec verba. Defendant filed the general issue and numerous special pleas which were subsequently amended, and demurrers were sustained to all except the seventh amended special plea, which set forth at length Warren's application for said beneficiary certificate and averred that although his age was in fact forty-six years and three months, he therein stated his age to be forty-one years and eight months; that by reason of said false statement which was known by applicant to have been false, defendant was deceived thereby, and issued said certificate. Numerous replications to this special plea were filed, in which it was averred, among other things, that the answer in the application as to the age of said Warren was not falsely or fraudulently made, but made honestly and in good faith; that the defendant was not deceived thereby; that the defendant knew the falsity thereof, waived the untruth of said answer, and is now estopped from insisting that said certificate is void. Upon these replications issues were joined, a trial was had before a jury which resulted in a verdict in favor of the defendant upon which the court, after denying a motion for a new trial, rendered judgment. Plaintiff sued out this writ of error to

Dec. 6th. 1915

Elizabeth Warren,

Plaintiff in error,

vs.

Grand Lodge of Brotherhood

of Railroad Trainmen,

Defendant in error,

Error to ...

Opinion.

review that judgment.

Upon the hearing in the lower court plaintiff sustained the averments of her declaration by introducing in evidence the benefit certificate, identifying herself as the beneficiary named therein and as the wife of the assured, proved the death of the assured as having occurred on July 29, 1917, the payment of dues and assessments to and including the month of July, 1917, notification to the defendant of assured's death, and the waiver by defendant of the necessary proofs of death. Certain sections of the by-laws of defendant were admitted, thereby establishing the amount to be paid in case of the death of the assured. By this proof plaintiff in error made a prima facie case. Benes v. Bankers Life Ins. Co. 282 Ill. 236. Thereupon defendant offered in evidence that section of its constitution and by-laws providing that an applicant for membership shall be "not less than eighteen, and not to exceed forty-five years of age", together with the application of assured dated Jan. 1, 1909, in which the following appears, viz: "Date of Birth, 1867, month 25, Day of month, Sept. Age 41 years, 8 months . . . . B. Have you ever been a member of the B. or R.B. or B. of R.T. - No". The Secretary and Treasurer of defendant testified in its behalf that the first knowledge he had that assured was more than 45 years of age at the time the application of assured was accepted by it came to him from the declaration made by assured accompanying his claim for diaability dated May 29, 1917, which he received on June 6, 1917. In order to sustain the allegations of its special plea that the statement of assured in his application as to his age was a misrepresentation, falsely, fraudulently and knowingly made by assured, defendant introduced an affidavit of assured, executed September 16th, 1897, to the effect that at that time he was 34 years of age, together with two letters, both dated June 11, 1917, one from assured and the other from his sister, written at the dictation of assured, both stating that assured was born Sept. 25, 1862. The statement of assured made on May 29, 1917, to the effect that his age was then 55 years was also offered and admitted in evidence. Defendant produced no evidence tending to prove that Warren's statement

review that judgment.

Upon the hearing in the lower court plaintiff introduced the
evidence of her declaration by introducing in evidence the insur-
ance certificate, identifying herself as the beneficiary named therein
and as the wife of the assured, proved the death of the assured as
having occurred on July 29, 1917, the payment of dues and assessments
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accompanying his claim for disability dated Aug 10, 1917, which he
received on June 6, 1917. In order to sustain the allegations of its
special plea that the statement of assured in his application as to
his age was a misrepresentation, namely, fraudulently and wrongly
made by assured, defendant introduced an affidavit of assured, executed
September 16th, 1897, to the effect that at that time he was 24 years
of age, together with two letters, both dated June 11, 1917, the first
assured and the other from his sister, written at the dictation of
assured, both stating that assured was born Sept. 25, 1868. The
statement of assured made on May 20, 1917, to the effect that he
age was then 35 years was also offered and admitted in evidence.
Defendant produced no evidence tending to prove that Barnes's statement

in his application that he had not previously been a member of defendant's order was untrue. In rebuttal, plaintiff in error was permitted to prove declarations made by the assured in 1905, 1906, 1907 and 1908, to the witness Mrs. Sloan, that he was born September 25, 1865, but refused to permit plaintiff in error to testify as to what she had heard her husband say with reference to the date of his birth, and refused to permit a sister of assured to express her opinion to the effect that assured was born either in 1865 or 1866, that the exact age of assured was uncertain, and that because of the death of assured's parents when he was very small, no record of his birth was kept. The court also refused to permit plaintiff in error to state whether assured was a member of defendant prior to 1909 and refused to permit her to testify concerning the payment of dues by her for assured to defendant prior to January 1, 1909, and refused to admit in evidence the record of the secretary of defendant's local lodge showing that on Feb. 13, 1898, the application of assured for membership therein was reported upon favorably, and he was elected and duly re-admitted as a member. The trial court refused to admit in evidence numerous receipts for dues issued to assured by the local lodge of defendant, covering the period from Sept. 30, 1895 to Feb. 22, 1897, but permitted plaintiff to prove that assured had been a member of defendant's order in 1894. The trial court also refused to admit in evidence a travelling card issued by defendant to assured, and dated May 25, 1896, and refused her offer to prove that the total amount of dues paid by assured to defendant upon the benefit certificate sued on, aggregated $289.60, and refused to admit in evidence various sections of defendant's constitution and by-laws, prescribing the duties of the various officers of the order upon the receipt of an application for membership therein. Some twelve days prior to the trial an order was entered by the court requiring defendant to produce upon the trial certain records, documents and files of defendant showing assured to have been a member of defendant prior to 1909, and these documents not having been produced, plaintiff in error complains because she was not permitted to read this order to the jury, and insists

in his application that he had not previously been a member of Defendant's order was untrue. In rebuttal, plaintiff in error was permitted to prove declarations made by the assured in 1905, 1906, 1907 and 1908, to the witness Rice, Idem, that he was born September 25, 1865, but refused to permit plaintiff in error to testify as to what she had heard her husband say with reference to the date of his birth, and refused to permit a letter of assured to appear but by opinion to the effect that assured was born either in 1865 or 1866, that the exact age of assured was uncertain, and that because of the death of assured's parents when he was very small, no record of his birth was kept. The court also refused to permit plaintiff in error to state whether assured was a member of Beneficial order in 1909 and refused to permit her to testify concerning the payment of dues by her for assured to defendant prior to January 1, 1909, and refused to admit in evidence the record of the secretary of defendant's local lodge showing that on Feb. 13, 1899, the application of assured for membership therein was rejected upon ballot, and he was elected and duly re-admitted as a member. The trial court refused to admit in evidence numerous receipts for dues issued to assured by the local lodge of defendant, covering the period from Sept. 30, 1895 to Feb. 25, 1897, but permitted plaintiff to prove that assured had been a member of defendant's order at Enid. The trial court also refused to admit in evidence a travelling card issued by defendant to assured, and dated May 25, 1896, and refused her offer to prove that the total amount of dues paid by assured to defendant upon the benefit certificate sued on, aggregated $267.00, and refused to admit in evidence various sections of defendant's constitution and by-laws, prescribing the duties of the various officers of the order upon the receipt of an application for membership therein. Some twelve days prior to the trial an order was entered by the court requiring defendant to produce upon the trial certain records, documents and files of defendant showing assured to have been a member of defendant prior to 1909, and these documents not having been produced, plaintiff in error contends she was not permitted to read this order to the jury, and lastly

that the court erred in all of its rulings excluding her profferred evidence.

From the foregoing resume of the evidence it is apparent that assured was more than forty-six years of age at the time he applied for membership in defendant's order in 1909, and it is therefore insisted by defendant in error under the authority of National Home Building and Loan Assn. v. The Home Savings Bank, 181 Ill. 35; Steele v. Fraternal Tribunes, 215 Ill. 190; Converse v. Emerson & Co. 242 Ill. 619; U.S. Brewing Co. v. Dolese, 259 Ill. 274; Sherry v. Women's Catholic Order of Foresters, 166 Ill. App. 254; North Avenue Bldg. Assn. v. Huber, 270 Ill. 75; Sowersby v. Royal League, 159 Ill. App. 626, and Mercantile Trust Co. v. Kastor, 273 Ill. 332, that the certificate in this case is ultra vires, and that there can be no recovery thereon. In all of these cases the limitation was imposed upon the corporation or association by its charter. In the instant case it will be noted that this age limitation is found not in the charter of the Association, but in its constitution. This constitution is a code of laws adopted by the association, and is in reality nothing more than a by-law; Peterson v. Gibson, 191 Ill. 365; Supreme Lodge K. of P. v. Kutscher, 179 Ill. 340; Supreme Lodge K. of P. v. Trebbe, 179 Ill. 348; Wood v. Mystic Circle, 212 Ill. 532.

In this state, the charter or organic law of such associations as defendant in error, consists of the certificate of organization granted to it by the state and the statutes of the state which define their powers. Wood v. Mystic Circle, supra. It is only when the action of the corporation is beyond its power conferred by its charter or by existing laws that the defense of ultra vires may be interposed. "A contract of a corporation which is ultra vires in the proper sense of that term - that is to say, outside the object of its creation, as defined by the laws of its organization, and therefore beyond the powers conferred upon it by the legislature, - is not only voidable, but wholly void and of no legal effect". Steele v. Fraternal Tribunes, 215 Ill. 190. So far as the record in this case discloses there is no charter provision which prohibited defendant in error from issuing this certificate of membership, the

that the court erred in all of its rulings excluding her proffered evidence.

From the foregoing resume of the evidence it is apparent that assured was more than forty-six years of age at the time he applied for membership in defendant's order in 1909, and it is therefore immaterial that defendant in error under the authority of Mutual Home Building and Loan Assn. v. The Home Savings Bank, 143 Ill. 28; Western v. Fraternal Tribunes, 218 Ill. 190; Commerce v. Insurance Co. 181 Ill. 619; U.S. Brewing Co. v. Dolese, 259 Ill. 474; Shorey v. Woman's Catholic Order of Foresters, 165 Ill. App. 584; North Chicago Bldg. Assn. v. Huber, 270 Ill. 75; Schwartzby v. Royal League, 184 Ill. App. 526, and Mercantile Trust Co. v. Baxter, 273 Ill. 380, that the certificate in this case is ultra vires, and that there can be no recovery thereon. In all of these cases the limitation was imposed upon the corporation or association by its charter. In the instant case it will be noted that this age limitation is found not in the charter of the Association, but in its constitution. This constitution is a code of laws adopted by the association, and is in reality nothing more than a by-law; Peterson v. Gibson, 191 Ill. 359; Supreme Lodge K. of P. v. Ketscher, 179 Ill. 340; Supreme Lodge K. of P. v. Trebbe, 179 Ill. 348; Wood v. Mystic Circle, 118 Ill. 334.

In this state, the charter or organic law of each association or defendant in error, consists of the certificate of incorporation granted to it by the state and the statutes of the state which define their powers. Wood v. Mystic Circle, supra. It is only when the action of the corporation is beyond its power conferred by its charter or by existing laws that the defense of ultra vires may be interposed. "A contract of a corporation which is ultra vires in the proper sense of that term - that is to say, outside the object of its creation, as defined by the laws of its organization, and therefore beyond the powers conferred upon it by the legislature, - is not only voidable, but wholly void and of no legal effect." Mystic v. Fraternal Tribunes, 218 Ill. 190. So far as the record in this case discloses there is no charter provision which prohibited defendant in error from issuing this certificate of membership, the

most that can be said is that it was issued by the officers of the order in violation of that provision of its by-law which limited the age of its beneficial members. It was therefore within the power of the defendant to issue this certificate, and the defense of ultra vires is not available to it.

Where the age limitation provision of a by-law has been violated there can be no recovery in the absence of any waiver or estoppel upon the part of defendant, but it is a provision that may be waived. Wood v. Mystic Circle, supra; Harvick v. Modern Woodmen of America, 158 Ill. App. 570; Gurley v. The Massac County Mutual Relief Assn. 186 Ill. App. 492; Coverdale v. Royal Arcanum, 193 Ill. 91; High Court Independent Order of Foresters v. Schweitzer, 171 Ill. 325, and whether or not defendant waived this provision or is estopped from relying thereon are questions of fact for the jury to determine. O'Brien v. Catholic Order of Foresters, 172 Ill. App. 638, and cases cited therein, and any evidence tending to prove that defendant waived this provision of its by-laws was admissible.

The contract of the parties hereto must be determined from the language of the certificate alone. Spence v. Central Accident Ins. Co. 236 Ill. 444. The certificate of insurance upon which this suit is based makes no reference to the application or the statements therein made, and the application not being made a part of the contract by the terms of the certificate itself, any statements therein are mere representations and not warranties. Spence v. Central Accident Ins. Co. supra; Continental Life Ins. Co. v. Rogers, 119 Ill. 474; Weisguth v. Supreme Tribe of Ben Hur, 272 Ill. 541; Hancock v. Knights of Security, 303 Ill. 66. In his application Warren adopted the statements and answers therein as his own, admitted them to be material, warranted them to be true, full and complete, and made them the basis of his contract with the Brotherhood and agreed that if any untrue or incomplete statements or answers had been made, the contract should be null and void, and of no effect. The statements therein that he had never before been a member of defendant's order and that his age was 41 years and 8 months, under the foregoing authorities

his age was 41 years and 8 months, under the foregoing authorities that he had never before been a member of defendant's order and that the statements were untrue or incomplete statements or answers but were, the contract should be null and void, and of no effect. The statements [illegible] material, warranted them to be true, fair and complete, and under the terms of his contract with the beneficiary was agreed that if any the statements and answers thereto as his own, whether them to be order in violation of the provision of its by-law which limited the age of its beneficial members. It was thereby within the power of the defendant to issue this certificate, and the defense of [illegible] virus is not available to it.

Where the age limitation provision of a by-law has been violated there can be no recovery in the absence of any waiver or estoppel upon the part of defendant, but it is a provision that may be waived. Wood v. Mystic Circle, supra; Hartvick v. Modern Women of America, 186 Ill. App. 570; Hurley v. The Maccabees, 186 Ill. App. 492; Overdale v. Royal Arcanum, 179 Ill. 93; High Court Independent Order of Foresters v. Gemmeiter, 171 Ill. 326, 331 whether or not defendant waived this provision or is estopped from relying thereon are questions of fact for the jury to determine. O'Brien v. Catholic Order of Foresters, 178 Ill. App. 636, and cases cited therein, and any evidence tending to prove that defendant waived this provision of its by-laws was admissible.

The contract of the parties hereto must be determined from the language of the certificate alone. Greene v. Central Accident Ins. Co. 236 Ill. 444. The certificate of insurance upon which this suit is based makes no reference to the application or the statements therein made, and the application not being made a part of the contract by the terms of the certificate itself, any statements thereof are mere representations and not warranties. Wood v. Central Accident Ins. Co. supra; Continental Life Ins. Co. v. Harper, 149 Ill. 474; Weisguth v. Supreme Tribe of Ben Hur, 272 Ill. 541; Hartvick v. Knights of Security, 203 Ill. 65. In his application [illegible]

must be held to be representations and not warranties. It is true that the Appellate Court of the Fourth District, in a suit brought against defendant in error upon a similar benefit certificate sustained a special plea which alleged that the applicant represented his age in his application to be forty-four years, and three months, whereas he was then forty-eight years, eight months and three days of age, and that said statement with reference to his age was warranted to be true in said application and set up the provisions of its constitution limiting its membership to those between the ages of eighteen and forty-five. The court, after reviewing some of the authorities, said: "Under the above authorities the statement by the insured with reference to his age was a warranty, and if not true, it would be material to the risk and would render the certificate null and void"; Daily v. Grand Lodge Brotherhood of Railroad Trainmen, 226 Ill. App. 164. This holding fails to take into consideration that the contract of the parties must be determined from the language of the certificate alone, and that the application was not made a part of the contract by the terms of the certificate itself, and fails also to distinguish between charter and non-charter age limitations.

"Any statement made by applicant for insurance which relates to the risk, and is declared by the policy, or in another instrument incorporated with it, to be a condition of the insurance, is a warranty. Its truth is in the nature of a condition precedent and must be literally true to create any liability. A mis-representation is a statement of something as a fact which is untrue and material to the risk, and which the insured states, knowing it to be untrue, in an attempt to deceive, or which he states positively is true without knowing it to be true, and which has a tendency to mislead. Neither the fact that the word 'warranty' is used or omitted is conclusive of the nature of a statement or its effect on the policy". Hancock v. Knights of Security, 303 Ill. 71.

"There is a material and substantial difference between the legal effect of a warranty and a representation. A representation must relate to a material matter, and it is only required to be substantially true, while a warranty must be literally true and its

must be held to be representations and not warranties. It is true that the Appellate Court of the Fourth District, in a suit brought against defendant in error upon a similar benefit certificate sustained a special plea which alleged that the applicant represented his age in his application to be forty-four years, and there recited, whereas he was then forty-eight years, eight months and three days of age, and that said statement with reference to his age was warranted by the true in said application and not by the statements of the constitution limiting its membership to those between the ages of eighteen and forty-five. The court, after reviewing some of the authorities, said: "Under the above authorities the statement by the insured with reference to his age was a warranty, and if not true, it would be material to the risk and would render the certificate null and void"; Daily v. Grand Lodge Brotherhood of Railroad Trainmen, 228 Ill. App. 164. This holding fails to take into consideration that the contract of the parties must be determined from the language of the certificate alone, and that the application was not made a part of the contract by the terms of the certificate itself, and fails also to distinguish between circular and non-circular misstatements.

"Any statement made by applicant for insurance which relates to the risk, and is declared by the policy, or in another instrument incorporated with it, to be a condition of the insurance, is a warranty. Its truth is in the nature of a condition precedent and must be literally true to create any liability. A mis-representation is a statement of something as a fact which is untrue and is material to the risk, and which the insured states, knowing it to be untrue. It may mislead by deceive, or which be stated positively in such attempt formula it to be true, and which has a tendency to mislead. Neither the fact that the word 'warranty' is used or omitted is exclusive of the nature of a statement or its effect on the policy". Mannon v. Equitable Security, 208 Ill. 71.

"There is a material and substantial difference between the legal effect of a representation [illegible] relate to a material matter, and it is only required to be substantially true, while a warranty must be literally true and it

materiality cannot be called in question. It is said that warranties enter into and are made a part of the contract, while representations are merely inducements to it". Minnesota Life Ins. Co. v. Link, 230 Ill. 273.

"Whether statements of an application made as incidental and inducement to a contract are material may be the subject of evidence and raise questions of fact unless they are of such a nature that all persons would agree that they are or are not material. Whether a representation is material is determined by the question whether reasonably careful and intelligent men would have regarded the fact stated as substantially increasing the chances of the event insured against, so as to cause a rejection of the application or different conditions". Hancock v. Knights of Security, Supra.

As the statement by Warren relative to the date of his birth was a representation, then in order to avoid this certificate under the pleadings, the burden was upon defendant to establish not only the falsity of the representation as to assured's age, but that applicant knew that it was false at the time it was made, and that it was material to the risk and these are questions of fact for the jury to determine. Spence v. Central Accident Ins. Co. supra; Delvaux v. Metropolitan Life Ins. Co. 172 Ill. App. 537; Kidder v. Supreme Assembly, 154 Ill. App. 489; Minnesota Life Ins. Co. v. Link, supra; Provident Savings Life Assurance Society v. Cannon, 103 Ill. App. 534; Joseph v. New York Life Ins. Co. 219 Ill. App. 452, affirmed in 308 Ill. 97; O'Kane v. Nat'l. Council of K. & L. of S. 227 Ill. App. 369. Any evidence therefore tending to show that assured in so answering the interrogatory as to his age, acted in good faith, and that his answer was not knowingly false was admissible.

It was proper to show by parties other than plaintiff in error any declarations made by assured as to the date of his birth, if made before suit was brought, and this the lower court permitted, but plaintiff in error, as the widow of assured, was not a competent witness to testify as to conversations or declarations made by her husband while their marriage relation existed. Baker v. Baker, 239

husband while their marriage relation existed. Bogue v. Bogue, 174

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Ill. 273.

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mine. Spence v. Central Accident Ins. Co. supra; Solyan v. Mercantile

Life Ins. Co. 172 Ill. App. 307; Linder v. Interstate Casualty, 166

Ill. App. 489; Minnesota Life Ins. Co. v. Shaw, supra; Provident Life

and Life Assurance Society v. Gannon, 108 Ill. App. 334; Lynch v.

New York Life Ins. Co. 219 Ill. App. 482, affirmed in 300 Ill. 71;

O'Hara v. Mut'l. Council of K. & L. of S. 227 Ill. App. 388. Any

Ill. 82; Stephens v. Collison, 256 Ill. 238; Donnan v. Donnan, 236 Ill. 341; Kielbassa v. Polish Roman Catholic Union, 141 Ill. App. 297; Clover v. Modern Woodmen of America, 142 Ill. App. 276; Furthermore all the questions put to her were general, and not limited to any particular time and therefore no error was committed by the court in sustaining objections thereto, nor did the court err in refusing to permit the sister of assured to express her opinion as to when assured was born or give her opinion upon any of the matters inquired about. Plaintiff in error did show that previous to 1909 assured had been a member of defendant so no harm resulted to plaintiff by reason of the court's refusal to admit in evidence the record of that fact, or the various receipts for dues issued to assured between 1895 and 1897, or the traveling card issued to assured in 1896, and we are unable to discover anything in any of the various sections of defendant's constitution and by-laws which the court excluded, which would have tended to establish an estoppel to rely upon, or waiver by the defendant of any of the provisions of its constitution or by-laws, nor did this proffered evidence tend in any way to show that assured acted in good faith in making his statements in his application as to his age or that the statements therein were not false or material.

The failure of defendant to produce certain documents and records upon the trial in obedience to the previous order of the court made secondary evidence thereof admissible, but no secondary evidence was produced, and the order itself only laid the foundation for the introduction of secondary evidence of the records and documents therein specified.

The court gave to the jury five instructions, four at the request of the plaintiff and one at the request of the defendant. The second instruction requested and given for the plaintiff told the jury that the age and date of birth of assured as stated by him in his application is presumed to be correct, and that if the defendant claims that he did not state his age and date of birth correctly in his application then it has the burden of proof and must show such fact by the greater weight of the evidence. By the second and third refused

The court gave to the jury five instructions, four of the request of the plaintiff and one at the request of the defendant. The latter instruction requested and given for the plaintiff told the jury that the age and date of birth of Lemuel as stated by him in his application is presumed to be correct, and that if the defendant claims that he did not state his age and date of birth correctly in his application then it has the burden of proof and must show that by the greater weight of the evidence. By the second and third instructions

III. 86; Stephens v. Quillinan, 156 Ill. 554; Green v. Lemmon, 164 Ill. 241; Kielpsaug v. Polish Roman Catholic Union, 141 Ill. App. 297; Glover v. Modern Woodmen of America, 160 Ill. App. 476; Instruction 5 more all the questions put to her were relevant, and not limited to any particular time and therefore no error was committed by the court in sustaining objection to the offer, nor did the court err in refusing to permit the mother of assured to answer her opinion as to whether assured was born or give her opinion upon any of the matters inquired about. Plaintiff in error did show that previous to 1900 Lemuel had been a member of defendant society and there resulted to plaintiff a record of the court's refusal to admit in evidence the record of that fact, or the various receipts for dues issued to assured between 1898 and 1904, or the testimony were taken to prevent it 1904, as we are unable to discover anything in any of the various sections of defendant's constitution and by-laws which the court construes, which would have tended to establish an estoppel to rely upon, or waiver by the defendant of any of the provisions of its constitution or by-laws, nor did this proffered evidence tend in any way to show that assured acted in good faith in making his statements in his application as to his age or that the statements therein were not false or material.

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instructions plaintiff asked the court to tell the jury that while the statements and answers in the application were called warranties they were in fact representations, and that before the defendant can claim any benefit or advantage by reason of any mis-statement therein, it must show by the greater weight of the evidence that assured made a false statement as to his age; that he made such statement knowingly with intent to deceive and that said statement as to his age was material. These instructions contained substantially correct statements of the law, and as no instruction was given covering these principles it was error for the court to refuse them.

The certificate upon which this suit was based entitled assured to certain benefits in case of his total and permanent disability. The record discloses that on May 29, 1917, Warren sent this certificate to the Grand Lodge at Cleveland, Ohio, together with his sworn claim. This claim was received by defendant on June 6, 1917, and at that time defendant was advised by Warren that he was born Sept. 25, 1862, and that his age was 55 years and 4 months; that on June 29, 1917, this certificate was stamped "canceled" by defendant; that thereafter defendant accepted the dues for July, 1917. These undisputed facts tended, at least, to support plaintiff's claim of waiver and estoppel and plaintiff's refused instructions, three, four and five were based on this evidence. Refused instruction number five told the jury that it was incumbent upon the defendant if it elected to rescind its contract of insurance to give notice of such election and tender to assured the premiums theretofore collected within a reasonable time after it obtained knowledge of the falsity of assured's answers with reference to his age. Instruction number three told the jury that defendant ratified its benefit certificate unless within a reasonable time after obtaining the knowledge of the falsity of assured's answer as to his age it tendered to assured the dues and benefits paid upon said certificate. Instruction number four defined "reasonable time". These instructions should have been given. Young v. Unior Life Ins. Co. 202 Ill. App. 321.

We will not extend this opinion by considering each one of the

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Those instructions should have been given. Lopez v. Swift Ice Co. 108 Ill. App. 321.

The certificate upon which this suit was based certified accrued
[illegible] certain benefits in case of his total and permanent disability.
The record discloses that on May 29, 1917, Barron sent this certificate
to the Grand Lodge at Cleveland, Ohio, together with his sworn claim.
This claim was received by defendant on June 6, 1917, and at that time
defendant was advised by Barron that he was born Sept. 30, 1868, and
that his age was 59 years and 8 months; that on June 29, 1917, this
certificate was stamped "cancelled" by defendant; that thereafter
defendant accepted the dues for July, 1917. The no qualifying fact
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and plaintiff's refused instructions, three, four and five were based
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tract of insurance to give notice of such election and further to
assured the premiums theretofore collected within a reasonable time
after it obtained knowledge of the falsity of assured's answers with
reference to his age. Instruction number three told the jury that
defendant retained its benefit certificate unless within a reasonable
time after obtaining the knowledge of the falsity of assured's answer
as to his age it tendered to assured the sums paid [illegible]
said certificate. Instruction number four refused "reasonable time".
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Those instructions should have been given. Lopez v. Swift Ice Co. 108 Ill. App. 321.

other refused instructions. Counsel for plaintiff in error overburdened the trial court by tendering twenty-two instructions, many of them being long and involved. What we have heretofore said in this opinion disposes of these other refused instructions, and no reversible error was committed in their refusal inasmuch as what was proper to have been given was covered by those given by the court. For the errors herein indicated the judgment of the circuit court is reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 17th day of Nov. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7200 (3390)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 631

Opinion Filed Oct. 18, 1923.

General No. 7200 Agenda 20

L. J. Kendall, William H. Hart, R. B. Stoddard, Arthur D. Ross, Mrs. P. C. McDonald, Eva M. Peterson and A. P. Allen,
Appellants,

vs.

A. M. Montgomery, Fred Bollman and George Westphal, Drainage Commissioners of Green River Special District in Bureau and Whiteside Counties, in the State of Illinois,
Appellees.

Appeal from Circuit Court of Bureau County.

231 I.A. 631

Jett, J.

This is a proceeding in mandamus instituted by appellants, who are the petitioners, against the Drainage Commissioners of Green River Special Drainage District in Bureau and Whiteside Counties, to compel them to levy against the lands in the District a certain sum of money for what is claimed to be needed improvements and changes in the system of drainage now existing in said District. The issues made by the pleadings were submitted to a jury, and the verdict was in favor of appellees. Judgment was rendered on the verdict of the jury, from which said judgment appellants prosecute this appeal.

The Green River Special Drainage District in Bureau and Whiteside Counties was organized under the Farm Drainage Act on June 5th, 1893, by order of the County Court of Bureau County, and the District as first organized was enlarged by order of the commissioners of said Drainage District, entered on January 18th, 1894, so that said Drainage District now embraces about 14,000 acres of farm lands located in the counties of Whiteside and Bureau. The lands embraced within the District drain into Green River which, before the organization of appellee District and other Districts above and below the same, was a natural river or water course, having its origin in Lee County and running in a southerly and southwesterly direction across Lee and Whiteside Counties, and running southwest and South across the lands of the District and thence westerly and southwesterly

General No. 9200

Ayonda No

L. J. Kendall, William H. Hart,
R. B. Stoddard, Arthur D. Hess,
Mrs. P. C. McDonald, Eve M.
Peterson and A. P. Allen,
Appellants,

vs.

A. M. Montgomery, Fred Bollman
and George Westphal, Drainage
Commissioners of Green River
Special District in Bureau and
Whiteside Counties, in the State
of Illinois,
Appellees.

Appeal from Circuit
Court of Bureau County.

Mott, J.

This is a proceeding in mandamus instituted by appellants, who are the petitioners, against the Drainage Commissioners of Green River Special Drainage District in Bureau and Whiteside Counties, to compel them to levy against the lands in the District a certain sum of money for what is claimed to be needed improvements and change in the system of drainage now existing in said District. The issues made by the pleadings were submitted to a jury, and the verdict was in favor of appellees. Judgment was rendered on the verdict of the jury, from which said judgment appellants prosecute this appeal.

The Green River Special Drainage District in Bureau and Whiteside Counties was organized under the Farm Drainage Act of June 5th, 1903, by order of the County Court of Bureau County, and the District as first organized was enlarged by order of the commissioners of said Drainage District, entered on January 15th, 1909, so that said Drainage District now embraces about 14,000 acres of farm lands located in the counties of Whiteside and Bureau. The lands embraced within the District drain into Green River which, bef re the organization of appellee District and other Districts above and below the same, was a natural river or water course, having its rise in Lee County and running in a southerly and southwesterly direction across Lee and Whiteside Counties, and running southwest and south across the lands of the District, and thence westerly and northwesterly

a distance of approximately forty miles from the lower end of the District where it emptied into Rock River. Above the boundary of the District the river runs for many miles through a sandy country. Portions of the river above and below the District have been improved by other districts organized for the purpose of draining adjacent farm lands. Just north of it lies the Hamilton and Hahnaman No. 1 Drainage District, which extends along the main channel of Green River above the boundary of the District in question, a distance of about seven miles, through which District Green River travels a distance of about eight miles, varying in width from about seventy to one hundred feet. In the said Hamilton and Hahnaman Drainage District the fall of Green River is about four feet to the mile. Next North of the Hamilton and Hahnaman No. 1 Drainage District is located the Hamilton Special Drainage District, through which Green river runs a distance of about two and one half miles at a width of about sixty feet, with washings of a greater depth in places. Through the Hamilton District the fall of Green River is in the neighborhood of four and one half feet to the mile or more. Above the Hamilton District is vacant area, that is, territory not organized in a drainage district for a distance of about two and one half miles along Green River. This territory is what is known as "No Man's Land". The fall through "No Man's Land" is about 5.28 feet to the mile. Next North of "No Man's Land" is the Maple Grove Drainage District No. 1, through which Green River runs, a distance of about six and one half miles, the fall of the river being about 5.28 feet per mile. The length of Green River as it passes through the District involved in this proceeding is 9.64 miles, and as stated in the amended petition for mandamus filed by relators, the proposed evacuation work and improvements which petitioners seek to compel the commissioners to perform in this case would give a fall of 11.8 feet in that distance, or a little more than one foot to each mile. So it appears that Green River runs down through the territory above the northern

boundary of the District in question at a fall of from 4 to 5.28 feet per mile, and that as it enters the District in controversy, becomes reduced to a fall of a little more than one foot per mile, and continues down stream from the lower end of the District at a varying distance of from .8 of a foot per mile to a 1.4 feet per mile for a distance of approximately 29 miles.

It appears from the testimony that one of the difficulties that has been encountered in the construction and maintenance by Drainage Districts of the main channel of Green River is the sand and sediment that has been carried from above the limits of the Drainage District in question into the main channel of said District; that the erosion of the channel in the Maple Grove Drainage District, where the soil is a loose, alluvial deposit containing more or less sand, and where the fall is at the rate of 5.28 feet per mile, has contributed toward the filling in of the channel of Green River in the Drainage District under consideration.

In "No Man's Land" the river is skirted by sand dunes which the river has persistently washed away, distributing sand down the stream. This sand country above Green River has been the main peril involved in the maintenance of the main channel in Green River in the Drainage District in controversy.

Much testimony was offered on the part of appellees to the effect that by reason of the various tributaries and the condition of the soil and land lying above the District in question, that the District would and did become filled up with sand, and that by reason of the washing of sand and other substances into the District in controversy it became and was impracticable to do and perform the kind and character of work that the petitioners sought to have done of and concerning said Drainage District.

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which the river has periodically washed away, distributing sand down
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peril involved in the maintenance of the main channel in Green
River in the Drainage District in controversy.

this case, are rather voluminous, but it appears that there were three different grounds of defense raised in and by the pleadings, which were as follows: First, that the system of drainage heretofore constructed, and now existing in the Green River Special District of Bureau and Whiteside Counties is adequate and sufficient, and furnished to all of the lands in the District, so far as practicable and proper, their equal benefit as contemplated when the lands were classified. Second, that the construction of the improvements which petitioners seek to compel by mandamus in this case would not be practicable. Third, that the cost of the improvement which petitioners seek to compel the commissioners to construct in this case would greatly exceed the benefit which would be derived therefrom.

There was testimony to the effect that in doing the work proposed by the petitioners it would be necessary to remove 179,723 cubic yards of earth to widen the Deep Cut to a width of 70 feet, and the removal of 743,866 cubic yards from the channel of Green River, exclusive of the Deep Cut, and the cost of removing the earth from the Deep Cut would be reasonably worth from 50 to 75 cents per cubic yard, and that the cost of removing the earth from the channel of Green River, exclusive of the Deep Cut, would be in the neighborhood of 20 cents per cubic yard. The proof also tended to establish the fact that it would be necessary to take down and replace six bridges across Green River, and that the removal and replacing of these bridges would cost $10,000.00. That the total cost of work proposed by the estimate furnished by petitioners would be about as follows: Deep Cut, in the neighborhood of $135,000.00; Main Channel, exclusive of Deep Cut, $150,000.00; Bridge work $21,750.00; or a total of $306,750.00, which sum would equal in the neighborhood of $22.00 per acre of all the land of the District, assuming that all the acreage was classified the same.

This case therefore resolves itself as follows: Is it practical to compel the commissioners of the District to spend

this case, are rather voluminous, but it appears that there were three different grounds of defense relied in and by the pleadings, which were as follows: First, that the system of drainage heretofore constructed, and now existing in the Green River Special District of Burden and Whiteside Counties is adequate and sufficient, and furnished to all of the lands in the District, so far as practicably and proper, their equal benefit as contemplated when the lands were classified. Second, that the construction of the improvements which petitioners seek to compel by mandamus in this case would not be practicable. Third, that the cost of the improvement which petitioners seek to compel the commissioners to construct in this case would greatly exceed the benefit which would be derived therefrom.

There was testimony to the effect that in doing the work proposed by the petitioners it would be necessary to remove 172,752 cubic yards of earth to widen the Deep Cut to a width of 70 feet, and the removal of 764,866 cubic yards from the channel of Green River, exclusive of the Deep Cut, and the cost of removing the earth from the Deep Cut would be reasonably worth from 50 to 75 cents per cubic yard, and that the cost of removing the earth from the channel of Green River, exclusive of the Deep Cut, would be in the neighborhood of 20 cents per cubic yard. The proof also tended to establish the fact that it would be necessary to take down and replace six bridges across Green River, and that the removal and replacing of these bridges would cost $10,000.00. That the total cost of work proposed by the estimate furnished by petitioners would be about as follows: Deep Cut, in the neighborhood of $155,000.00; main Channel, exclusive of Deep Cut, $130,000.00; Bridge work $21,750.00; or a total of $306,750.00, which sum would equal in the neighborhood of $4.70 per acre of all the land of the District, assuming that all the property was classified the same.

This case therefore involves itself as to [illegible]
practical to compel the commissioners of the District [illegible]

something over $300000000 in cleaning out and removing the earth from the main channel of Green River throughout the district, and in widening the Deep Cut to a bottom width of 70 feet, against the judgment of the commissioners?

It will be remembered that the issues of facts formed by the pleadings were submitted to a jury. The question of fact as to whether or not the present system of drainage affords an adequate outlet was an issue made by the pleadings, and it was the peculiar province of the jury to pass upon and determine, which was done by the verdict adversely to appellant.

Respondents introduced the testimony of practically all of the land owners in the district who reside therein, in support of the third plea of respondents to the effect that it is impossible and impracticable to afford the lands in the district better drainage than they are now afforded, and receiving from the system of drainage all benefits which were contemplated at the time said lands were classified, and which it is possible to accomplish; and in support of the sixth plea, wherein it is alleged that the existing drainage has at all times been sufficient and adequate for the lands of petitioners, and have afforded an adequate outlet for said lands; and in support of the ninth plea, wherein the allegations of the petition charging that the waters brought down the main ditch to the Cut off are retarded so as to deprive lands of petitioners of drainage and so as to prevent the tile on the lands of petitioners from carrying off the waters from their land, is denied; and in support of the eleventh plea, wherein the allegation of the petition that the lands are not drained and protected as contemplated in the system of drainage, and that the lands of petitioners receive only partial or no benefit, is denied.

judgment of the commissioners?

It will be remembered that the issues of fact raised by the pleadings were submitted to a jury. The question of fact as to whether or not the present system of drainage affords an adequate outlet was an issue made by the pleadings, and it was the peculiar province of the jury to pass upon and determine, which was done by the verdict adversely to appellant.

Respondents introduced the testimony of practically all of the land owners in the district who reside thereon, in support of the third plea of respondents to the effect that it is impracticable and impracticable to afford the lands in the district better drainage than they are now afforded, and receiving from the system of drainage all benefits which were contemplated at the time said lands were classified and which it is possible to accomplish; and in support of the ninth plea, wherein it is alleged that the existing drainage has at all times been sufficient and adequate for the lands of petitioners, and have afforded an adequate outlet for said lands; and in support of the ninth plea, wherein the allegations of the petition charging that the waters brought down the main ditch to the Out off are retarded so as to injure lands of petitioners if drained and so as to prevent the title on the lands of petitioners from carrying off the waters from their land, is denied; and in support of the eleventh plea, wherein the allegation of the petition that the lands are not properly protected as contemplated in the system of drainage, and that the lands of petitioners receive only partial or no benefit, is denied;

something over $3000000.00 in clearing out and re-ring the earth from the main channel of Green River throughout the district, and in widening the Deep Out to a bottom width of 70 feet, against the

The substance of the testimony of all these witnesses owning land in the District and residing thereon, was to the effect that they are now receiving proper drainage, and that the outlet furnished by the District is adequate to drain their lands at all reasonable times and that they have no complaint to make in view of existing conditions with reference to the outlet as the same is now constructed.

This case under consideration is quite similar in its facts to those in the case of Latham vs. Holland, et al, 133 Ill. App. 144, which was a petition for mandamus begun by twelve land owners to compel the commissioners to make extensive improvements in the system of drainage. In that case the commissioners contended that the main ditch conveyed away all the water brought to it, and drained the district at all times except when there was a heavy or extraordinary rainfall, at which times the water flowing into the district could not be carried off to prevent overflowing by any ditch that could reasonably have been constructed, and that if ditches of sufficient capacity to carry such floods could have been constructed the river into which the main ditch had its outlet would not have taken the water away in time to have prevented the overflow complained of. The commissioners in that case claimed that the capacity of the outlet river could not be enlarged unless its channel were cleared for a distance of thirty miles, and that the clearing of Skillet Fork would cost such an amount of money as to bankrupt the District. In affirming the judgment of the trial court, dismissing the petition, the Appellate Court in effect held that where the relief sought could not be procured without a vast expenditure of money, the lands of petitioners were being provided with an adequate outlet under the construction of Section 41 of the Farm Drainage Act. requiring the commissioners to carry out the original purpose of the organization of the District to the end that all of the lands, so far as practicable, shall receive their proper and equal benefits as contemplated when the lands were classified. In that case it was admitted that the

the substance of the testimony of all these witnesses showing that in the District and residing thereon, was to the effect that they are receiving proper drainage, and that the outlet furnished by the District is adequate to drain their lands at all reasonable times and that they have no complaint to make in view of existing conditions with reference to the outlet as the same is now constructed.

This case under consideration is quite similar in its facts to those in the case of Latson vs. Wallace, et al, 148 Ill. App. 144, which was a petition for mandamus begun by twelve land owners to compel the commissioners to make extensive improvements in the system of drainage. In that case the commissioners contended that the main ditch conveyed away all the water brought to it, and drained the district at all times except when there had a heavy to extraordinary rainfall, at which times the water flowing into the district could not be carried off to prevent overflowing by a ditch that could reasonably have been constructed, and that if ditches of sufficient capacity to carry such flood could have been constructed the river into which the main ditch had its outlet would not have taken the water away in time to have prevented the overflow complained of. The commissioners in that case claimed that the capacity of the outlet river could not be enlarged unless its channel were cleared for a distance of thirty miles, and that the clearing of Illinois River would have to be brought by the Federal Government. In affirming the judgment of the trial court, dismissing the petition, the Appellate Court in effect held that where the relief sought could not be procured without a vast expenditure of money, the lands of petitioners were below with no adequate outlet under the construction of Section 41 of the Farm Drainage Act, requiring the commissioners to carry out the original purpose of the organization of the District to the end that all of the lands, as far as practicable, shall receive their proper and equal benefits as contemplated when the lands were classified. In that case it was admitted that the

drainage existing was not sufficient to carry all of the water which was conveyed to it in time of extraordinary rains. In concluding the opinion of that case, the Appellate Court held that inasmuch as the court below saw all of the witnesses and heard their testimony, its judgment should not be disturbed.

We have examined all of the questions raised by appellants. The question as to whether or not the existing outlet furnished petitioners, was adequate and sufficient, was a question for the jury, and was determined by them in favor of appellees; likewise, the question as to whether or not the work proposed by petitioners was practical, was clearly a question of fact for the jury.

The petitioners complain of instructions on behalf of respondents on the ground that they leave the jury to decide what is practicable. We held in our former opinion that the question of the practicability of the work to be done was one of fact to be submitted to the jury. Kendall, et al, v. Montgomery, et al, 222 Ill. App. 552. On that occasion the petition was by this court held sufficient. Respondents pleaded that the work was impracticable, and petitioners joined issue on that question. A number of legal questions are discussed, and we are not prepared to hold that any serious error was committed by the court, of which the appellants can take advantage. If there were any errors committed in the instructions it was brought about at the suggestion of appellants. Appellants offered instructions on one theory of the case, and they were given; they now complain of certain refused instructions in which a contrary rule is announced. It is unnecessary to cite authorities to the effect that if appellants were instrumental in having the court hold the law, as contended for by them, during the trial of the case, they are not in any position, on appeal, to assume another position and have the cause reversed because of the fact that the court refused certain instructions, that were not in keeping with the theory on which the case was tried.

were not in keeping with the law on which the case was tried.

It is earnestly insisted by appellants that notwithstanding the verdict of the jury, judgment should be entered for them. This is a suit at law; the respondents were entitled to a jury trial, and the case having been submitted to the jury without any objection on the part of appellants, and in view of the showing made by the respondents, the court was clearly within its rights in refusing to direct a verdict or to render judgment in favor of appellants, notwithstanding the verdict.

On the whole, we think substantial justice has been done in this case. To our minds it would be highly impracticable to require the commissioners to proceed as contemplated in and by the petition of appellants, and being of the opinion that substantial justice has been done, the judgment of the court below is affirmed.

Judgment Affirmed.

Judgment Affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 27th day of Nov. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7206. (339)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 631

Opinion filed Oct. 18, 1923.

General No. 7206 Agenda No. 24.

Kreig Tanning Company,

appellant,

vs.

C. V. Engstrom & Company,

appellee,

Appeal from Circuit Court

of Peoria.

231 I.A. 631

Jones, J.

The appellant, Kreig Tanning Company, was the plaintiff and appellee, C. V. Engstrom and Company was the defendant in the trial court. Plaintiff was engaged in the tanning business in San Francisco, California, and the defendant in the wholesale leather business in Peoria, Illinois. This suit was for the purchase price of certain leather sold by the plaintiff to the defendant. A jury was waived and the cause was tried by the court. Plaintiff's demand was for $1409.69. The defendant filed a plea of set-off claiming damages in the sum of $1604 and also a plea of the general issue. The trial court found the issues in favor of the defendant on said pleas and that it had the right to recoup damages in the sum of $1319 leaving a balance due the plaintiff of $90.69. Judgment was rendered in favor of the plaintiff for this sum together with costs.

The agreement concerning the purchase and sale of the goods in question is to be found in the correspondence which passed between the parties. On October 11, 1916, plaintiff wrote the defendant offering to sell certain quantities and grades of leather and quoted the prices thereof. The letter stated that plaintiff was desirous of cleaning up before issuing their new list and that the offer was subject to the goods being unsold on receipt of reply. After this letter was received the defendant telegraphed the plaintiff as follows: "Will take entire offering October 11. Hold for letter ". On the same day the telegram was sent, defendant wrote the plaintiff a letter confirming the above telegram and saying that an order covering the shipment is enclosed and it had marked the shipping date December 16th being 60 days from the time the order was given. The letter further

Docket No. 7206

Argued & Dec. 14.

Kreig Tanning Company,

appellant,

vs.

C. V. Engstrom & Company,

appellee.

June, 1.

The appellant, Kreig Tanning Company, was the plaintiff and appellee, C. V. Engstrom and Company was the defendant in the trial court. Plaintiff was engaged in the tanning business in San Francisco, California, and the defendant in the wholesale leather business in Peoria, Illinois. This suit was for the purchase price of certain leather sold by the plaintiff to the defendant. A jury was waived and the cause was tried by the court. Plaintiff's demand was for $1409.89. The defendant filed a plea of set-off claiming damages in the sum of $1500 and also a plea of the general issue. The trial court found the issues in favor of the defendant on said plea and that it had the right to recoup damages in the sum of $1019 leaving a balance due the plaintiff of $390.89. Judgment was rendered in favor of the plaintiff for this sum together with costs.

The agreement concerning the purchase and sale of the goods in question is to be found in the correspondence which passed between the parties. On October 11, 1916, plaintiff wrote the defendant offering to sell certain quantities and grades of leather and quoted the prices thereof. The letter stated that plaintiff was desirous of closing up before learning their new list and that the offer was subject to the goods being unsold on receipt of reply. After this letter was received the defendant telegraphed the plaintiff as follows: "Will take entire offering October 11. Mail for letter ". On the same day the telegram was sent, defendant wrote the plaintiff a letter confirming the above telegram and saying that an order covering the shipment is enclosed and it has marked the shipping date December 16th being 60 days from the time the order was given. The letter further

stated that the defendant hoped the order would be so entered, but however, defendant wanted the entire lot and should the dating not meet with the approval of the plaintiff, the defendant would be willing to discuss the matter and make satisfactory arrangements for time of shipment. On October 20th, plaintiff wrote the defendant stating that it had already disposed of a portion of the goods mentioned in the offer and expressing dissatisfaction with the dating placed in the order by defendant. The letter concluded as follows, "Let us hear from you regarding making this shipment all at once and we will hold the same up until we hear from you by return mail." To this letter defendant replied among other things as follows: "Of course we want the goods and will be agreeable as to accepting the dates of shipment that you find absolutely necessary." Plaintiff wrote another letter to defendant on November 2, 1916, advising that other quantities of the goods offered had been sold. Defendant replied to this letter on November 7, 1916, saying that it was counting on receiving the entire shipment and that since plaintiff was unwilling to hold the order open indefinitely, defendant would expect immediate shipment. Plaintiff again wrote defendant on November 10, 1916, advising the latter that there was only a small portion of the goods left unsold and if these were desired a reply by wire must be made at once. This letter contained the following language: "When you sent the original order in, your instructions were very indefinite and as we had submitted this for immediate acceptance and shipment and you did not instruct us that way, the only thing for us to do was to cancel the order which we promptly did." Defendant on November 14, 1916, telegraphed and wrote plaintiff to send immediately all there was remaining of the goods mentioned in the original order. These goods were shipped as directed. During the correspondence three shipments of goods were made out of the stock offered. The total price of the goods shipped aggregated the said sum of $1409.69. None of the other goods mentioned in the original order were shipped to the defendant and its claim for recoupment and set-off arose out of the failure of the plaintiff to ship them in accordance with said order.

stated that the defendant hoped the order would be a catch, but however, defendant wanted the entire lot and should the matter not meet with the approval of the plaintiff, the defendant would be willing to discuss the matter and make satisfactory arrangements for the or shipment. On October 20th, plaintiff wrote the defendant stating that it had already disposed of a portion of the goods mentioned in the offer and expressing dissatisfaction with the delay please in the order by defendant. The letter concluded as follows, "Let us hear from you regarding making this shipment all at once as will hold the same up until we hear from you by return mail." To this letter defendant replied among other things as follows: "Of course we want the goods and will be agreeable as to accepting the later shipment that you find absolutely necessary." Plaintiff wrote another letter to defendant on November 2, 1916, advising that other quantities of the goods offered had been sold. Defendant replied to this letter on November 7, 1916, saying that it was counting on receiving the entire shipment and that since plaintiff was unwilling to hold the order open indefinitely, defendant would expect immediate shipment. Plaintiff again wrote defendant on November 10, 1916, advising the latter that there was only a small portion of the goods left unsold and if these were desired a reply by wire must be made at once. This letter contained the following language: "When you sent the original order in, your instructions were very indefinite and we had submitted this for immediate acceptance and shipment and you did not instruct us that way, the only thing for us to do was to cancel the order which we promptly did." Defendant on November 14, 1916, telegraphed and wrote plaintiff to send immediately all there was remaining of the goods mentioned in the original order. Three cars were shipped as directed. During the correspondence three shipments of goods were made out of the stock offered. The total price of the goods shipped aggregated the sum of $1405.63. None of the other goods mentioned in the original order were shipped by the defendant and the claim for recoupment and set-off arose out of the failure of the plaintiff to ship them in accordance with said order.

The point of contention between the parties is whether or not there was an unconditional acceptance by the defendant of plaintiff's offer. The offer itself was made subject to the right of the plaintiff to sell the whole or any portion of the goods offered prior to the receipt of an acceptance of the offer. Defendant's acceptance as contained in its telegram and letter of October 16th was not unconditional, because it inserted a new element in the transaction, to-wit; the right to specify the time of shipment at a date not more than sixty days thereafter. Plaintiff was not required to treat the order as it was received as an acceptance of its offer. It could have treated the order as an absolute rejection of the offer if it chose to do so. (El Reno Wholesale Grocery Company v. Stocking, 215 Ill. App. 393, affirmed, 293 Ill. 494). But plaintiff did not elect to so treat it. To the contrary on October 20th, it advised the defendant that the dating was unsatisfactory, that it had already sold a small portion but would hold the rest until it could hear from defendant by return mail. The reply which defendant made is found in the letter of October 25th from which we have above quoted and in that letter it unequivocally stated it wanted the goods and would accept the dates of shipment fixed by the plaintiff. As we view it, this letter constituted a definite unconditional acceptance of plaintiff's original offer at a time and in the manner suggested by the plaintiff. Plaintiff thereupon was bound to furnish the goods mentioned in the order with the exception of those which it had sold during the period of the correspondence. We have not quoted from all of the letters at length because we think it unnecessary to do so. It is apparent to us, however, from the contents of such letters that the price of leather goods was advancing from and after the date of the order. Whether or not this fact was a contributing cause to the controversy between the parties to this suit is a question we are not called upon to decide. The undisputed facts show that plaintiff offered to sell a considerable amount of merchandise to the defendant, that the offer was definitely accepted and that plaintiff has failed and refused to deliver to the defendant a large quantity thereof.

The point of contention between the parties is whether or not there was an unconditional acceptance by the defendant of plaintiff's offer. The offer itself was made subject to the right of the plaintiff to sell the whole or any portion of the goods referred to in the receipt of an acceptance of the offer. Defendant's acceptance as contained in its telegram and letter of October 16th was not unconditional, because it inserted a new element in the transaction, to-wit: the right to specify the time of shipment at a date not more than sixty days thereafter. Plaintiff was not required to treat the order as it was received as an acceptance of its offer. It could treat the order as an absolute rejection of the offer if it chose to do so. (Mt Kemo Wholesale Grocery Company v. Benskin, 116 Ill. App. 395, affirmed, 213 Ill. 466). But plaintiff did not elect to so treat it. To the contrary on October 20th, it advised the defendant that the dating was unsatisfactory, that it had already sold a small portion but would hold the rest until it could hear from defendant by return mail. The reply which defendant made is first in the letter of October 25th from which we have above quoted and in that letter it unequivocally stated it wanted the goods and would accept the dates of shipment fixed by the plaintiff. As we view it, this letter constituted a definite unconditional acceptance of plaintiff's original offer at a time and in the manner suggested by the plaintiff. Plaintiff thereupon was bound to furnish the goods mentioned in the order with the exception of those which it was ready during the period of the correspondence. We have set up the [illegible] all of the letters at length because we think it unnecessary. It is apparent to us, however, from the contents of each letter that the price of leather goods was advancing from mid fall the date of the order. Whether or not this fact was a contributing cause to the controversy between the parties to this suit is a question we are called upon to decide. The undisputed facts show that plaintiff offered to sell a considerable amount of merchandise at the ordered, that the offer was definitely accepted and that plaintiff was finally and refused to deliver to the defendant a large quantity thereof.

The defendant is entitled to recover whatever damages it may have suffered, by reason of plaintiff's default.

The trial court heard the evidence upon the question of damages. There was no dispute as to what were the market prices of the goods not delivered, but it is contended by plaintiff that the court in determining the damages used the market prices as of February 8, 1917 instead of an earlier date. We think the court did not err in taking the market prices of February 8th as a basis, for the reason that this is the date of a letter in which plaintiff stated to the defendant that it felt under no obligation concerning the order, and that it had disposed of the goods at higher prices. It appears to us to be the date of the breach and it was therefore the proper date to be taken by the court in ascertaining the damages suffered by the defendant. In cases of this character the measure of damages is the difference, if any, between the contract price of the article sold and the market value thereof at the time of the default, together with interest upon such difference from the time of the breach to the time of the trial. Driggers v. Bell, 94 Ill. 223; Farson v. Buder, 187 Ill. App. 318.

We are of the view that the judgment of the trial court is correct and that there is no substantial error in the case. The judgment is therefore affirmed.

Judgment affirmed.

Judgment affirmed.

We are of the view that the judgment of the trial court is correct and that there is no substantial error in the case. The judgment is therefore affirmed.

The trial court heard the evidence upon the question of damages, but it is contended by plaintiff that the court determining the damages used the market prices as of February 5, instead of an earlier date. We think the court did not err in taking the market prices of February 5th as a basis, for the reason that this is the date of a letter in which plaintiff stated to the defendant that it felt under no obligation concerning the order, and that it had disposed of the goods at higher prices. It appears to us that the date of the breach and it was therefore the proper date to be taken by the court in ascertaining the damages suffered by the plaintiff. In cases of this character the measure of damages is the difference, if any, between the contract price of the articles sold and the market value thereof at the time of the default, together with interest upon such difference from the time of the breach to the time of the trial. Wrigleys v. Doll, 94 Ill. App. 518; Pierson v. Snyder, 194 Ill. 518.

The respondent is entitled to recover whatever damages it may have suffered, by reason of plaintiff's default.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of Nov. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7217 (339)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-three, within and for the Second District of the State of Illinois:

Present--The Hon. AUGUSTUS A. PARTLOW, Presiding Justice.
Hon. THOMAS M. JETT, Justice.
Hon. NORMAN L. JONES, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

231 I.A. 631

Opinion Filed Oct. 18, 1923.

General No. 7217 Agenda No. 30

F. G. Buckley & Bros. Co.,

appellant,

vs.

Mary Emma Stickney, et al,

appellees,

Appeal from the Circuit Court

of Henry

231 I.A. 631

Jones, J.

A bill to foreclose a mechanic's lien was filed by F. G. Buckley & Bros. Co. against Mary Emma Stickney and Sallie E. Stickney, certain original contractors and sub-contractors. The said contractors and sub-contractors filed answers and intervening petitions, asking for liens. The Stickney sisters filed answers to the original bill and to all intervening petitions. These answers alleged that the work had not been completed in accordance with the contract and that the purported "final certificates" issued by the architect were not correct. They also alleged a state of facts in reference to the conduct of the architect and appellants showing bad faith in the issuing of said certificates.

The cause was referred to a Master, who heard the testimony and found against some of the intervening petitioners. Objections were filed to his report which were overruled and by agreement of parties said objections stood as exceptions to the Master's report before the court. Upon a hearing the court sustained the Master in all essential particulars and approved the report. A decree was entered from which the firm of Bowling & Rutherford has appealed. All other intervening petitioners abided by the decree.

The Stickney sisters were the owners of a farm near Woodhull in Henry County, Illinois and were desirous of remodelling the dwelling house thereon and of doing certain work on other buildings on the premises. On September 10, 1919 they entered into a written contract with one C. Whitney an architect. Stevens agreed to furnish all plans, specifications, etc., and to render all superintendence necessary in and about the work to be done for a stipulated compensation

General No. 7217 Agenda No. 30

P. C. Buckley & Bros. Co.,

appellant,

vs.

Mary Emma Stickney, et al.,

appellees,

Appeal from the Circuit Court
of Perry

Times, J.

A bill to foreclose a mechanic's lien was filed by P. C. Buckley & Bros. Co. against Mary Emma Stickney and Nellie E. Stickney, certain original contractors and sub-contractors. The said contractors and sub-contractors filed answers and intervening petitions, asking for liens. The Stickney sisters filed answers to the original bill and to all intervening petitions. These answers alleged that the work had not been completed in accordance with the contract and that the purported "final certificates" issued by the architect were not correct. They also alleged a state of facts in reference to the conduct of the architect and appellants showing bad faith in the issuing of said certificates.

The cause was referred to a Master, who heard the testimony and found against some of the intervening petitioners. Objections were filed to his report which were overruled and by agreement of parties said objections stood as exceptions to the Master's report before the court. Upon a hearing the court sustained the Master in all essential particulars and approved the report. A decree was entered from which the first of November a writ of error intervening petitioners sued by the decree.

The Stickney sisters were the owners of a farm near Woodhull in Henry County, Illinois and were desirous of re-building the dwelling house thereon and of doing certain work on other buildings on the premises. On September 10, 1919 they entered into a written contract with one C. Whitney an architect. Stevens agreed to furnish all plans, specifications, etc., and to render all superintendence necessary in and about the work to be done for a stipulated consideration

of ten per cent of the actual cost of the work.

On the next day the appellees, Stickney sisters, entered into a written contract with the said Dowling & Rutherford, who were general contractors of Chicago. This contract provided that the work should be done in a substantial, workmanlike manner to the satisfaction and under the direction of the said architect; that the contractors should furnish all material and labor necessary to complete the work; that their compensation should be the actual cost of the work plus ten per cent. The contract further provided that in case any difference of opinion shall arise between the parties thereto in relation to the contract, the decision of the architect shall be final and binding on all parties.

After the above mentioned contracts had been executed it was decided to be impractical to remodel the old dwelling house and therefore it was decided to build a new house. Plans and specifications were drawn by the architect and approved by appellees. The architect estimated the cost of the work to be about $11,000 and the general contractors at $12,000. Work was begun and certificates were issued to appellants amounting to more than $26,000. The work was not done to the satisfaction of appellees and they made numerous complaints both to appellants and to the architect, and pointed out what in their judgment were material failures on the part of the contractors to do the work in the manner provided by the contract. Appellees refused to make payments on all of the certificates issued by the architect because of the manner in which the work was done. Considerable correspondence passed between appellees and their architect whose office was in the city of Chicago. This correspondence is very voluminous and cannot be set out here, but it is apparent from it as well as from the uncontradicted testimony appearing in the record that he did not contend that the work had been completed in substantial compliance with the terms of the contract but promised that alterations and corrections would be made in the work so as to make it comply with the contract. While the situation thus existed he wrote a letter to appellees in which he stated that he had been called

of ten per cent of the normal cost of the work.

On the next day the appellees, Stickney & Ayers, entered into a written contract with the said Dowling & Rutherford, who were general contractors of Chicago. This contract provided that the work should be done in a substantial, workmanlike manner to the satisfaction and under the direction of the said architect; that the contractors should furnish all material with labor necessary to complete the work; that their compensation should be the actual cost of the work plus ten per cent. The contract further provided that in case any difference of opinion should arise between the parties thereto in relation to the contract, the decision of the architect shall be final and binding on all parties.

After the above mentioned contracts had been executed it was decided to be impractical to remodel the old dwelling house and therefore it was decided to build a new house. Plans and specifications were drawn by the architect and approved by appellees. The architect estimated the cost of the work to be about $11,000 and the general contractors at $12,000. Work was begun and certificates were issued to appellants amounting to more than $50,000. The work was not done to the satisfaction of appellees and they made numerous complaints both to appellants and to the architect, and pointed out what in their judgment were material failures on the part of the contractors to do the work in the manner provided by the contract. Appellees refused to make payments on all of the certificates issued by the architect because of the manner in which the work was done. Correspondence ensued between appellees and their architect whose office was in the city of Chicago. This correspondence is very voluminous and cannot be set out here, but it is apparent from it as well as from the uncontradicted testimony appearing in the record that [illegible] complied with the terms of the contract but provided that alterations and corrections would be made in the work so as to make it comply with the contract. While the situation time existed be[illegible] a letter to appellees in which he stated that he had been called

upon by the several contractors to issue final certificates for their work; that he therefore appointed August 24th, 1920 as a day when all bills would be audited and certificates issued for the same, and that he desired appellees to be present. Appellees employed the law firm of Sturtz & Ewan to protect their interests. The architect did not issue the certificates on the day so appointed but on September 20, 1920 he wrote to Mr. Ewan of said law firm stating that he would issue final certificates to all contractors on September 23, 1920. In answer to this letter Ewan went to Chicago to see the architect and also wrote him a letter in which he objected to the issuance of any final certificates and as reasons for such objection stated seven specific causes, each of which appear to us to be a substantial ground for objection, if based on facts. Notwithstanding these objections made by appellees and their attorneys the architect proceeded to issue the certificates in question.

The Master heard the testimony of witnesses who appeared before him. He was in a very much better position to judge of the facts than we are. Nevertheless, we have carefully examined both the abstract and the record and we incline to the view that the master's findings are correct, and that the work was not performed in substantial compliance with the terms of the contract.

It is contended by appellants that appellees were not in a position to submit to the court the question as to whether or not the work had been done in substantial compliance with the terms of the contract for the reason that the architect was made the final arbiter of all differences and his decision was binding upon the parties. As a proposition of law, this contention is generally correct, the exceptions being in cases of fraud or mutual mistake. (Barbee v. Findlay, 221 Ill. 251; Concord Apartment House Co. v. O'Brien, 228 Ill. 360).

The answers filed by appellees do not, in terms, allege that the certificates given appellants were fraudulently procured, but the definite allegations of fact contained in them are tantamount

upon by the several contractors to issue final certificates for their work; that he therefore appointed Messrs. Lewis as a day when all bills would be audited and certificates issued for the same, and that he desired appellees to be present. Appellees employed the law firm of Curtis & Ewan to protect their interests. The architect did not issue the certificates on the day so appointed but on September 20, 1910 he wrote to Mr. Ewan or said law firm stating that he would issue final certificates to all contractors on September 24, 1910. In answer to this letter Ewan went to Chicago to see the architect and also wrote him a letter in which he objected to the issuance of any final certificates and as reasons for such objection stated seven specific causes, each of which appear to us to be a substantial ground for objection, if based on facts. Notwithstanding these objections made by appellees and their attorneys the architect proceeded to issue the certificates in question.

The Master heard the testimony of witnesses who appeared before him. He was in a very much better position to judge of the facts than we are. Nevertheless, we have carefully examined both the evidence and the record and we incline to the view that the master's findings are correct, and that the work was not performed in substantial compliance with the terms of the contract.

It is contended by appellants that appellees were not in a position to submit to the court the question as to whether or not the work had been done in substantial compliance with the terms of the contract for the reason that the architect was made the final arbiter of all differences and his decision was binding upon the parties. As a proposition of law, this contention is reversible. (Barbee v. Pinkney, 221 Ill. 251; 2 Mechem Agency 2d ed., sec. 1111, 1119).

The answers filed by appellees do not, in terms, allege that the conditions given specifically were dependently performed, but

to a charge of bad faith both on the part of the general contractor and the architect. The record in this case appears to justify the findings of the Master and the Chancellor against the appellants. Where the proof under proper pleadings establishes that a certificate has been issued by an architect to a contractor in bad faith, such certificate is not binding even though the contract provides that the architect is to determine all questions of dispute and that his determination shall be conclusive upon the parties. (Brownell Implement Co. v. Critchfield, 197 Ill. 61; 30 Am. & Eng. Ency. Law, 1245; 9 C.J. 777).

Notwithstanding appellant's claim that the architect's certificate was a final certificate it is evident to us that it cannot be held to be such. Both the contractors and the architect were fully aware of the objections made by appellees at the time the certificate was issued. That such certificate was not believed to be a final certificate is evidenced by the letter written by the architect to the appellees on September 27, 1920. This letter was written in reply to a letter from Mary Emma Stickney to the architect on September 24th, the day the certificate was issued. The architect in his said letter of reply which bears date three days after his certificate speaks of the conference he had had with Mr. Ewan, makes a long explanation of the total cost of the work and promises to make a complete inspection and audit and to correct any and all work which has not been done in conformity with the contract. The letter adds, "I will then give my findings to the contractors and instruct them to do any things which may be required to bring their work up to specifications and contract".

In view of this letter, it is impossible for us to believe that the certificate was a final certificate as claimed by appellants. If it was not a final certificate they certainly have no right to collect for work which remains unfinished or not in substantial compliance with the contract. We believe the decree in this case is equitable and right and should be affirmed.

Decree affirmed.

to a charge of bad faith both on the part of the general contractor and the architect. The record in this case appears to justify the findings of the master and the Chancellor against the appellants. Where the proof under proper pleadings establishes that a certificate has been issued by an architect to a contractor in bad faith, such certificate is not binding even though the contract provides that the architect is to determine all questions of dispute and his determination shall be conclusive upon the parties. (Brownell Investment Co. v. Pritchfield, 147 Ill. 61; 35 Am. St. Rep. 324; 9 C.J. 777).

Notwithstanding appellant's claim that the architect's certificate was a final certificate it is evident to us that it cannot be held to be such. Both the contractors and the architect were fully aware of the objections made by appellees to the [illegible] and knew that such certificate was not believed to be a final certificate is evidenced by the letter written by the architect to the appellees on September 27, 1920. This letter was written in reply to a letter from Daly Bros. stationery to the architect on September 24th, the day the certificate was issued. The architect in his said letter of reply quite [illegible] bears date three days after his certificate stands if the contractors be bad had with Mr. Bwen, make a [illegible] completion of the total cost of the work and promises to make a complete investigation and audit and to correct any and all [illegible] with the contract. The letter adds, "I will then [illegible] to the contractors and instruct them to do any things which may be required to bring their work up to specifications and contract".

In view of this letter, it is impossible for us to believe that the certificate was a final certificate as claimed by appellants. If it was not a final certificate they certainly have no right to direct for work which remains unfinished or not in substantial compliance with the contract. We believe the decree in this case is [illegible] and right and should be affirmed.

Decree affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 17th day of Nov. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

Ill. Unpublished opinions

231

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